Supreme Court, U.S.
FILED

95-977 DEC 18 1995

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No. _____

In The

Supreme Court of the United States

October Term, 1995

KELLY M. O'GILVIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

LINDA D. KING,
Counsel for Petitioner
6135 E. Central
Wichita, Kansas 67208
(316) 686-2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

87 pp

QUESTIONS PRESENTED

1. Whether the Tenth Circuit Court of Appeals in its decision in *O'Gilvie v. United States*, 95-2 USTC ¶50,508 (10th Cir. 1995), has interpreted a federal statute in a manner that unreasonably limits enforcement of legislative intent and unreasonably promotes governmental interest.

2. Whether a punitive damages award received in a suit involving physical injury is excludable from gross income as "any damages . . . received on account of personal injuries . . . ." 26 U.S.C. § 104(a)(2).

3. Whether the federal district court is required to strictly comply with Federal Rules of Civil Procedure in order to modify its judgments or has power independent of the Federal Rules to modify its judgment.

PARTIES BELOW

Parties below are Kelly M. O'Gilvie, Plaintiff-Appellant in case no. 94-3004, Cross-Appellee in case no. 94-3031. Kevin M. O'Gilvie and Stephanie L. O'Gilvie, Defendants-Appellees in case no. 94-3058; United States of America, Defendant-Appellee in case no. 94-3004, Cross-Appellant in case no. 94-3031, and Plaintiff-Appellant in case no. 94-3058.

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OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 95-2 USTC ¶50,508 (10th Cir. 1995), and is reprinted in the appendix at page 1. The decision of the District Court rendered on November 30, 1993 is reprinted in the appendix at pages 31 and 37, and the amended decision rendered on December 7, 1993 is reprinted in the appendix at page 38.

JURISDICTION

The Tenth Circuit issued its decision on September 19, 1995. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions are listed below and are included in the appendix:

Section 61(a), 26 U.S.C. §61(a). Appendix at 49.

Section 213(b)(6) of Revenue Act of 1918. Appendix at 49.

Section 104(a)(2), 26 U.S.C. §104(a)(2) (1988). Appendix at 49.

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Federal Rules of Civil Procedure 60(a). Appendix at 44.

STATEMENT OF FACTS

In 1983, Betty O'Gilvie died of toxic shock syndrome. In 1988, her estate was awarded, in addition to other damages, $10 million in punitive damages against International Playtex, Inc. After payment of attorney's fees and expenses, the balance of the award was paid to Betty O'Gilvie's heirs at law,

her husband, Kelly O'Gilvie, and her children, Kevin O'Gilvie and Stephanie O'Gilvie. Kelly O'Gilvie, the petitioner in this application, and the children paid the taxes on the punitive damages and made proper administrative application for refund of those taxes based upon the I.R.C. §104(a)(2) exclusion. The request for refund was denied. Significantly, the IRS paid the children their refunds upon request. The refund of the children's taxes was recommended by the Commissioner of the Internal Revenue and was presented to the Joint Committee of the United States Congress on Taxation for approval.

In the Federal District Court of the District of Kansas, ~~Kelly~~ O'Gilvie sought a refund for taxes paid on the punitive damages award. Initially, the district court granted summary judgment in favor of the defendant on the issue of the taxability of punitive damages on May 26, 1992. (Appendix at 25.) On that same day, this Court issued its decision in *United States v. Burke*, 504 U.S. 229. Petitioner filed a motion for reconsideration, which the district court granted. **Judgment** was entered on August 26, 1992 in favor of the taxpayer, finding that I.R.C. §104(a)(2) exempted from taxation the award of punitive damages that taxpayer had received on account of physical injuries. (Appendix at 26 and 29.)

The decision that taxpayer's punitive damage award was exempt from taxation under I.R.C. §104(a)(2) was necessary to render justiciable a second issue of whether an "additional amount" of damages was taxable interest or additional punitive damages and, therefore, also exempt from tax. On October 27, 1992 the district court withdrew its order of August 26, 1992 on the issue of taxability of punitive damages stating:

> [I]t has been brought to the court's attention that there is an issue which was raised in the amended pretrial order filed April 23, 1992 . . . which has not been fully briefed by the parties. Both parties desire to have the issue ruled upon before a final judgment is entered.
>
> Accordingly, pursuant to Rule 60(a), Fed. R. Civ. P, the judgment entered on August 26, 1992 is

> hereby withdrawn, ***subject to reinstatement at the conclusion of the case***. (Emphasis added.) (Appendix at 30.)

The second issue was briefed and the district court considered whether the "additional amount" was characterized as punitive damages, and, therefore, also exempt from tax under I.R.C. §104(a)(2). The district court entered **Judgment** on November 30, 1993 characterizing the "additional amount" as taxable interest and not as additional punitive damages. (Appendix at 37.) *The district court states in the introductory paragraph of the* ***Memorandum and Order*** *of November 30, 1993*:

> In a previous opinion, this court held O'Gilvie's punitive damages award was excludable from income tax pursuant to §104(a)(2) of the Internal Revenue Code.

Appendix at 31.

On December 7, 1993, the district court entered on its own initiative under Federal Rule of Civil Procedure 60(a), what the court entitled ***Amended*** **Judgment** which included the omitted portion of the November 30, 1993 **Judgment**. (Appendix at 39.) *No motion to amend or correct the judgment was made by either party at any time.* Defendant made no claim that the district court was without authority to amend the November 30, 1993 **Judgment** on its own initiative. Taxpayer filed timely notice of appeal on January 5, 1994 on the issue of the characterization of the "additional amount." Defendant filed its notice of appeal on February 1, 1994, more than sixty (60) days from the entry of judgment on November 30, 1993.

REASONS FOR GRANTING THE WRIT

(a) The United States Court of Appeals for the Tenth Circuit has expressed and applied a methodology of statutory construction which places an impermissible restriction upon the enforcement of Congressional legislative intent by requiring immediate recourse to a "default rule" in favor of the government upon a finding of intrinsic ambiguity in the words of the statute.

(b) The United States Court of Appeals for the Tenth Circuit has entered a decision in this case in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Horton v. Commissioner*, 33 F.3d 625 (1994), and with the United States Tax Court in *Commissioner v. Miller*, 93 TC 330 (1989); *Horton v. Commissioner*, 100 TC 93 (1993); *Downey v. Commissioner*, 97 TC 10 (1991); and *Robinson v. C.I.R.*, 1995 U.S. App. Lexis 33,759. Both this Court in *C.I.R. v. Schleier*, 515 U.S. ___, 115 S.Ct. 294, 95-1 USTC ¶50,309, and the Sixth Circuit in *Horton*, found the statute *unambiguous* and yet arrived at opposing conclusions about the meaning and results. This Court in *Burke* and the Tenth Circuit in *O'Gilvie* found the statute *ambiguous* and yet articulate different and mutually exclusive tests. The conflict between the circuit courts is not resolved by application of the principles of statutory interpretation described by this Court.

(c) The Tenth Circuit has entered a decision that is in clear conflict with the enacting Congress' original intent of the meaning of the words of the Revenue Act of 1918 Section 213(b), the direct predecessor of I.R.C. §104(a)(2).

(d) The rationale underlying the decision of the Tenth Circuit is contrary to and overrules a long line of settled case law that has been relied upon by taxpayers, counsel, tax advisors, and the IRS to interpret I.R.C. §104(a)(2). Such rationale applies a "compensatory purpose" test rejected by those cases.

(e) The United States Court of Appeals for the Tenth Circuit has interpreted a federal statute, I.R.C. §104(a)(2), in such a manner that the 1989 Amendment to that statute is rendered meaningless.

(f) The Tenth Circuit has impermissibly expanded the power of the federal district court to modify its judgments beyond the authority granted by the Federal Rules of Civil Procedure.

DISCUSSION

(a) The United States Court of Appeals for the Tenth Circuit has expressed and applied a methodology of statutory construction which places an impermissible restriction upon the enforcement of Congressional legislative intent by requiring immediate recourse to a "default rule" in favor of the government upon a finding of intrinsic ambiguity in the words of the statute.

The duty of all federal courts is to discern the meaning intended by the enacting Congress in the words they wrote. When that intent is evident in the words of the statute, the meaning is plain. If those words are found to be ambiguous, the meaning is required to be interpreted by resorting to extrinsic facts. The courts have an obligation, consecrated by our constitution and common law, to give full voice to the Congressional acts if those acts are constitutional and within the power and authority of Congress. There has been no suggestion here that exemption of punitive damages from taxation is outside the constitutional power and authority of Congress.

Rigorous inquiry into the "intent of Congress" assures the full expression of the purposes of our government's legislative branch and full enforcement of that expression. Premature application of a "default rule" in favor of the government is a suppression of that Congressional intent. The Tenth Circuit found that the statute, I.R.C. §104(a)(2), is susceptible to two meanings and therefore must succumb to the "default rule." In doing so, the Tenth Circuit neglected a primary duty of the court, namely to interpret the intent from extrinsic evidence, if necessary, to give full expression to the acts of Congress. There is ample extrinsic evidence for such an interpretation of this statute. The Tenth Circuit did not find that interpreting the meaning of the statute was not possible, only that it was not necessary. The reality in *O'Gilvie* is that the intent of Congress is a tattered flag that the Tenth Circuit and those courts it follows do not feel obliged to salute.

This diminishment of the proper role of extrinsic evidence in the construction of congressional intent was first practiced in this context by the Fourth Circuit in *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990). The Fourth Circuit begins its analysis thus:

> At the outset, we reject the conclusion of the Tax Court that the plain meaning of §104(a)(2) compels exclusion of punitive damages from gross income . . . . Instead, we find that §104(a)(2) is *ambiguous* as to which form of causation is intended by "on account of." (Emphasis added.)

Miller, 914 F.2d at 590.

In the next step of analysis, the error in the method of the Fourth Circuit is revealed:

> Given the inherent ambiguity of §104(a)(2), we must resort to extrinsic aid to interpretation. . . . First, as the Tax Court recognized, it is a well-recognized, even venerable, principle that exclusions to income are to be construed narrowly. . . . **Given that §104(a)(2)'s language is not plain, the principle is applicable and inclines us to adopt the Government's more restrictive view of what kinds of damages are excludable from gross income under the section.** (Emphasis added.)

Miller, 914 F.2d at 590.

The flaw is precisely this: The "principle of narrow construction" is not a "default rule" that relieves the court from comprehensive review of extrinsic evidence. The "principle of narrow construction" requires that the intent be discerned from the careful analysis of all extrinsic evidence and that a *clear intent to exclude* is evidenced.

The Fourth Circuit continued its incomplete and flawed analysis by resorting to only one actual extrinsic aid to interpretation, and that one even forbidden by statute. The Fourth Circuit finds an underlying "compensatory purpose" mandated in the descriptive title and arrangement of §104(a)(2), notwithstanding the fact that such interpretation is expressly prohibited by the Code at §7806(b).

SEC. 7806. CONSTRUCTION OF TITLE

(b) Arrangement and Classification. – No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, nor shall any table of contents . . . or similar . . . descriptive matter relating to the contents of this title be given any legal effect.

(Appendix at 40.)

In its determination that §104(a)(2) has an underlying "compensatory purpose," the Fourth Circuit failed to address the careful and considered determinations in *Threlkeld* and its progeny that awards are *not required* to be a return of capital or compensatory to be excluded under I.R.C. §104(a)(2). *Threlkeld v. C.I.R.*, 848 F.2d 81 (6th Cir. 1988); *Burke v. United States*, 504 U.S. 229, 112 S.Ct. 1867 (1992), 92-1 USTC ¶50,254; *C.I.R. v. Schleier*, 515 U.S. ___, 115 S.Ct. 294, 95-1 USTC ¶50,309. See also footnote 2 on page 21, *infra*.

The Fourth Circuit did not consider any other extrinsic aid to interpretation despite the abundance of extrinsic evidence which surrounds this statute. The Treasury Regulation §1.104-1(c), the long standing administrative practice of excluding punitive damages, and the extensive case law which reject the interpretation that the statute had an underlying "compensatory purpose" were all dismissed without a word. The conflicts between the decision of the Fourth Circuit and the decisions of the courts in *Burford v. United States*, 642 F.Supp. 635 (N.D. Ala. 1986) and *Thompson v. C.I.R.*, 866 F.2d 709 (4th Cir. 1989), were rationalized, not resolved. The Fourth Circuit states that " . . . the liquidated damages award served both a deterrent *and* compensatory purpose. . . . Although Alabama law 'labeled' wrongful death proceeds as 'punitive,' the *Burford* court's close inspection of Alabama law uncovered an Alabama case rejecting the precise argument advanced in [*Burford*] – that such damages are obtained for punitive rather compensatory purposes." *Miller*, 914 F.2d at 591. In *Miller*, the Fourth Circuit avoided addressing the

problem by simply saying that punitive damages aren't really punitive damages.

In short, meaning of the statute was not construed by the Fourth Circuit in *Miller*. See *Crane v. Commissioner*, 331 U.S. 1 (1947). The statute was improperly interpreted by premature application of a "default rule," and yet the incomplete and flawed analysis dominates the decisions in the Circuits. This domination of the Fourth Circuit's analysis has come as the result of the misunderstanding and confusion between the "principle of narrow construction of exclusions from income" and a "default rule." The "default rule" was actually used by the Fourth Circuit and imitated in the cases which follow it, including the Tenth Circuit in *O'Gilvie*. The "principle of narrow construction" is *not* a "default rule" that relieves the court from comprehensive review of extrinsic evidence. The "principle of narrow construction" requires that the intent be discerned from the careful analysis of all extrinsic evidence and that a *clear intent to exclude* be evidenced. Courts have decided the words of the statute are *not* required to have plain meaning, but that the clear intent to exclude can be interpreted from extrinsic evidence. *Burke*, 112 S.Ct. 1867, and *Threlkeld*, 848 F.2d 81. An ambiguous statute *does not* trigger the "default rule." The words "any damages . . . received on account of personal injuries," can express that clear intent, whether by plain meaning or from interpretation of extrinsic evidence.

A "default rule" would be applicable if, and only if, all means of interpretation from extrinsic evidence had been exhausted. Application of a "default rule" would require an *affirmative finding* that no "intent" can be discerned. The finding in *O'Gilvie* would have to have been that no choice can be made between two competing interpretations based on extrinsic evidence. Premature application of a "default rule" before such a finding denies full expression and enforcement of the intent of Congress in that legislation. The clear and undeniable consequence of such a premature application of a "default rule" is the impermissible promotion of a finding in favor of the government even in instances where the elected Congresses intended otherwise.

Even after the Fourth Circuit's flawed decision in *Miller*, numerous other courts continued to follow the proper methodology. Some of these courts, upon finding that the statute was *unambiguous*, applied that plain meaning to exclude the income from taxation. *Pistillo v. C.I.R.*, 912 F.2d 145 (6th Cir. 1990); *Commissioner v. Miller*, 93 TC 330 (1989); *Downey v. Commissioner*, 97 TC 10 (1991); *United States v. Burke*, 929 F.2d 1119 (6th Cir. 1991); *O'Gilvie v. United States*, 92-2 USTC ¶50,567 (D. Kan. 1992); *Hawkins v. United States*, 93-1 USTC ¶50,208 (D. Ariz. 1993); *Horton v. Commissioner*, 100 TC 93 (1993); *Horton v. Commissioner*, 33 F.3d 625 (6th Cir. 1994); *McKay v. Commissioner*, 102 TC 16 (1994); and *Bennett v. United States*, 94-1 USTC ¶50,044. Other courts, upon finding that the words of the statute were *ambiguous*, applied a more complete analysis to interpret the comprehensive extrinsic facts attendant upon this statute. See *Burke*, 504 U.S. 229.

After this Court's decision in 1992 in *Burke*, the district court in *Rice v. United States*, 834 F.Supp. 1241 (E.D. Cal. 1993), in its confusion about the decisional law, made no attempt to interpret the statute but set directly to the task of applying two tests, one approved in *Burke*, the "nature of underlying claim" test, and the other the Fourth Circuit's "compensatory purpose" test. The *Rice* decision in 1993 was the first time a court derived two separate tests for §104(a)(2) from the same language. The application of two tests by the district court in *Rice* without analysis is of little significance in the determination of the meaning of the words. However, the lure of avoiding the problem of analysis by the handy expedient of using both tests was too powerful to resist. The Fifth Circuit in *Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995), and the Ninth Circuit in *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994) applied two tests and found that, under the application of both tests, punitive damages were taxable. This court in *Schleier* avoids finding that an *unambiguous* statute has two distinct interpretations by denying that the Treasury Regulation is one interpretation of the statutory language. In *Schleier*, the Treasury Regulation is

demoted to an "additional requirement" merely imposed by the IRS. *Schleier*, 95-1 USTC ¶50,309 at 88,117.

Premature application of a "default rule" has fostered this illogical result. This Court must, as it did in *Crane*, *supra*, interpret the words of the statute from extrinsic evidence to determine which of two mutually exclusive and competing interpretations was intended by Congress.

(b) The United States Court of Appeals for the Tenth Circuit has entered a decision in this case in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Horton v. Commissioner*, 33 F.3d 625 (1994), and with the United States Tax Court in *Commissioner v. Miller*, 93 TC 330 (1989); *Horton v. Commissioner*, 100 TC 93 (1993); *Downey v. Commissioner*, 97 TC 10 (1991); and *Robinson v. C.I.R.*, 1995 U.S. App. Lexis 33,759.

The cases of *Horton* in the Sixth Circuit and *O'Gilvie* in the Tenth Circuit share two essential characteristics. In both, the nature of the underlying claim is uncontrovertedly a tort and there is physical injury; in *O'Gilvie* a death, and in *Horton*, damage to a residence. No other circuit has dealt with the question of an award of punitive damages in connection with a case involving physical injury in an action where the underlying claim is undeniably a tort. Despite these similarities, these two sister courts are unable to agree on the meaning or even a *method of construction* of the meaning of the eight words in I.R.C. §104(a)(2). Even after *Schleier*, the Tenth Circuit does not, because it cannot logically, follow the methodology of the *Schleier* decision.

The legal analysis of whether an award made under the federal antidiscrimination statute is excluded under I.R.C. §104(a)(2) as in *Burke*, 112 S.Ct. 1867, and *Schleier*, 95-1 USTC ¶50,309, in the narrow sense, is not applicable to the determination of whether awards are excludable when it is uncontested that a tort claim is the underlying claim as in *O'Gilvie*. The *Burke* and *Schleier* decisions do not address punitive damages awarded in a case which involves a physical

injury, but only whether ADEA damages are excluded. However, the circuit courts in *Horton* and *O'Gilvie* rely largely upon the analysis provided by those two cases.

The confusion of the Internal Revenue Service and the courts since 1984 about the status of the law regarding the application of I.R.C. §104(a)(2) to these facts is demonstrated in the history of the *O'Gilvie* case. In 1988, the taxpayer, Kelly O'Gilvie and his children, received an award of punitive damages from precisely the same source, the wrongful death claim awarded to the estate of their wife and mother. The taxes on the punitive damage award were paid by all parties and requests for refund were made. The IRS refused a refund to Kelly O'Gilvie while his children's refunds were submitted for approval to the Joint Committee on Taxation with the recommendation of the Commissioner that the refunds be approved. The children's refunds were approved and paid. Only upon discovery by the litigation arm of the IRS that the father's case was being litigated was a demand for return of the children's refunds made. The cases were joined for purposes of determination of the issue of excludability under I.R.C. §104(a)(2). Upon reconsideration after this Court's decision in *Burke*, the District Court for the District of Kansas found that this court's decision in *Burke* mandates that punitive damages are excluded under I.R.C. §104(a)(2). In our previous order, this court focused on the nature of the punitive damage award itself, rather than the nature of the underlying claim. In light of *Burke*, we believe our focus was misplaced. The Supreme Court's opinion makes clear that the proper inquiry . . . is on the nature of the claim underlying the . . . award. *O'Gilvie*, appendix at 27.

The *source* of the confusion regarding the status of the law is demonstrated in the application of that case law by the Tenth Circuit. The Tenth Circuit overruled the District Court decision finding that I.R.C. §104(a)(2) is susceptible to at least two different meanings, and is, therefore, *ambiguous*. **The Tenth Circuit specifically holds that the only requirement in the face of ambiguity is to construe the provision strictly in favor of the government.** This line of reasoning

on its face is appealing in its simplicity and directness. Unfortunately, the methodology beneath the Tenth Circuit's analysis is flawed and hazardous. It is this flaw in method which is the source of great confusion.

The Tenth Circuit in *O'Gilvie*, the Fourth Circuit in *Miller*, the Federal Circuit in *Reese*, the Fifth Circuit in *Wesson*, and this Court in *Schleier* have found the "default rule" controlling. If the statute is unambiguous, there is no need to resort to a "default rule." If the statute is ambiguous, construction by resort to extrinsic evidence is required and a "default rule" has no function. Only upon an affirmative finding that the meaning of the statute cannot be interpreted, can a "default rule" be brought to bear upon the question.

The holdings of the circuit courts whose method of analysis the Tenth Circuit follows are summarized below:

> Four Circuits have held that noncompensatory punitive damages are not received "on account of" personal injuries; therefore they are not excludable from gross income under §104(a)(2). See *Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994); *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990). **These decisions begin with the threshold determination that the language of §104(a)(2), that gross income does not include "the amount of any damages received . . . on account of personal injuries," is *ambiguous*.** (Emphasis added). They then interpret the statute and determine that Congress intended to exclude only damages awarded to compensate for tort-like injury, relying on some or all of the following: (1) the statutory context and title, (2) the principle that exclusions from income should be construed narrowly, (3) the policy and legislative history of §104, (4) a Treasury Revenue Ruling *(sic)* addressing this issue, (5) the 1989 Amendment to §104(a)(2), and (6) Supreme Court cases discussing §104(a)(2) in other contexts. Because punitive damages (generally) are not

> intended to compensate, but to deter and punish, these circuits concluded that §104(a)(2) does not exclude punitive damages from income.

O'Gilvie, 95-2 USTC ¶50,508 at 89,638.

In the first step in its decision-making process, the Tenth Circuit finds the statute *ambiguous*:

> Neither the *Burke* nor the *Schleier* Court addressed the question whether the phrase in §104(a)(2) "on account of" personal injuries is ambiguous. With respect to this [question of ambiguity] we agree with the four circuits that have found it is susceptible of at least two meanings.

O'Gilvie, 95-2 USTC ¶50,508 at 89,639. Upon the finding of ambiguity, the Tenth Circuit then employs the appealing but defective method of immediate reliance upon a "default rule" to the exclusion of all else:

> In sum, it is not clear whether Congress intended to exclude punitive damages from income under §104(a)(2). *Although "good reasons tug each way" in this case, we need not decide "which tug harder," because we must follow the default rule that exclusions from income are narrowly construed.* (Emphasis added.)

O'Gilvie, 95-2 USTC ¶50,508 at 89,641.

The confusion is hopelessly compounded by the fact that this Court found the statute *ambiguous* in *Burke*, but found the same language *plain* in *Schleier*. Notwithstanding the statement by the Tenth Circuit in *O'Gilvie* that "[n]either the *Burke* nor the *Schleier* court address the question of ambiguity," this Court in *Schleier* is very resolute that the meaning of the statute is plain and unambiguous. In at least four different instances in the decision, this Court makes that declaration: "In our view, **the plain language of the statute** undermines the respondent's contention," *Schleier*, 95-1 USTC ¶50,309 at 2,163. "In contrast, no part of respondent's ADEA settlement is excludable under the **plain language of §104(a)(2),**" *Id.* at 2,164. "Respondent seeks to circumvent the **plain language of §104(a)(2)** by relying on the Commissioner's regulation interpreting that section," *Id.* at 2,165. "In

sum, the **plain language of §104(a)(2)**, the text of the applicable regulation and our decision in *Burke* establish two independent requirements that a taxpayer must meet before a recovery may be excluded under §104(a)(2)." *Id.* at 2,167.

This Court in *Schleier* makes absolutely no effort to interpret the statute from extrinsic evidence but relies upon the *plain language* for the meaning. However, the court places great emphasis upon the "default rule."

> We have also emphasized the corollary to §61(a)'s broad construction, namely, the "default rule" of statutory construction that exclusions from income must be narrowly construed.

Id. at 2,163. It is from that platform of an *unambiguous* statute that this court in *Schleier* proceeds to apply that "plain meaning" *as the court understands it* without resort to interpretation. *Id.* at 2,172. This threshold determination in *Schleier* of an *unambiguous* statute is contrary to the holdings in the cases upon which the Tenth Circuit relies. As the Tenth Circuit states in the passages quoted above, the Circuit Courts in *Miller*, *Hawkins*, *Wesson*, and *Reese* found the statute *ambiguous*.

Only the Court of Claims in *Reese v. United States*, 94-1 USTC ¶50,232 (Fed. Claims 1994), found the statute *unambiguous* and determined, as this Court did in *Schleier*, that the plain and unambiguous meaning clearly prohibited the exclusion to punitive damages. The Circuit Court of Appeals for the Federal Circuit *affirmed* the holding that the damage award was not excluded, however, the Federal Circuit *firmly reversed* the Court of Claims in regard to the finding of ambiguity. "The language 'on account of' is not free of ambiguity; rather, it is susceptible of at least two conflicting interpretations," *Reese*, 24 F.3d at 230. The Federal Circuit then applied the "default rule."

There are other courts which have found, as this Court did in *Schleier*, that this statute is *unambiguous*. Each of those courts, however, arrived at quite a different result from that finding of an unambiguous statute. In *Burford v. United States*, 642 F.Supp. 635 (N.D. Ala. 1986); *Horton v. Commissioner*, 100 TC 93 (1993); *Horton v. Commissioner*, 33 F.3d 625 (6th Cir. 1994); *O'Gilvie v. United States*, 92-2 USTC

¶50,567 (D. Kan. 1992); *Hawkins v. United States*, 93-1 USTC ¶50,208 (D. Ariz. 1993); and *Commissioner v. Miller*, 93 TC 330 (1989), each of the courts applied the "plain meaning" to hold that the punitive damage, or liquidated damage award is excluded by §104(a)(2).

While both the Sixth Circuit and the Tax Court in *Horton* agree with this Court in *Schleier* that the meaning is *plain*, the decisions are contradictory. The Sixth Circuit applied the *plain meaning* of the statute to exclude from taxation all damages that flow from a tort claim for personal injury, including punitive damages. This Court in *Schleier* applied the *plain meaning* to tax punitive damages. This Court in *Burke* found the meaning of the words of the statute *ambiguous* and susceptible to interpretation by various methods of statutory construction and determined that the interpretation expressed in the Treasury Regulation §1.104-1(c) was intended. See *Burke*, *id.* at 1,870, and *Schleier*, *id.* at 2,172.

Although the facts and the question were virtually identical in *Burke* and *Schleier*, in *Burke* this Court did not mention two interpretations or tests from the same words. In *Burke*, this Court gave approval to the *interpretation* expressed in the Treasury Regulation as the valid interpretation of the statute's meaning. *Burke*, 115 S.Ct. at 2166. In *Schleier*, the Treasury Regulation has lost it status as a valid interpretation and been relegated to the position of a requirement "in addition to" the statutory requirement.

In summary, this Court in *Burke* found the meaning of the statute *ambiguous* and susceptible to interpretation by various methods to determine whether damages awarded in Title VII suit and §104(a)(2) are excluded. *Burke* adopted the interpretation expressed in the Treasury Regulation. The Sixth Circuit in *Horton* found the statute *plain* but followed the test approved in *Burke* that "the necessary inquiry is into the nature of the underlying claim and that is the beginning and end of the inquiry." *Burke*, 112 S.Ct. at 1869, 1872. The Ninth Circuit in *Hawkins* found the meaning *ambiguous* and applied both meanings. This court in *Schleier* found the meaning of the statute *plain* and applied the two competing tests

simultaneously. No consistent methodology can be derived from this case law and no logical results achieved.

(c) The Tenth Circuit has entered a decision that is in clear conflict with the enacting Congress' original intent of the meaning of the words of the Revenue Act of 1918 Section 213(b), the direct predecessor of I.R.C. §104(a)(2).

The Sixty-fifth Congress wrote the words of section 213(b) of the Revenue Act of 1918 to exclude those amounts it believed were not within the definition of gross income. The Tenth Circuit quotes the legislative history which specifically indicates that the bill which was enacted as section 213(b) provides that such amounts *shall* be excluded from gross income:

> Under present law it is doubtful whether amounts received throughout accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income. *The proposed bill provides that such amounts shall not be included in gross income.* (Emphasis added.) H.R. Rep. No. 767, 65th Cong.2d Sess. 9-10 (1918) (Quoted in *Reese*, 24 F.3d at 233).

O'Gilvie, 95-2 USTC ¶50,508 at 89,639. This doubt whether such amounts were required to be included in gross extended to punitive damages as well. *Glenshaw Glass*, 348 U.S. 426, 75 S.Ct. 473, 211 F.2d 928 (1955).

The words of Section 213(b) were clear and fulfill the intention to exclude any and all damages as expressed in the statute and explained in the Committee Report above. Now, the courts have vitiated the original intent of the enacting Congress by the finding that the enacting Congress was under a mistaken belief about the law. These courts which adopt the *revised* intent theory find that the words, "any damages . . . received on account of personal injury," do not now mean what the Congressmen who wrote them thought they meant. This approach to interpreting "original intent" is

untenable. A "mistake" of law or a change in the understanding of the law that occurred more than 36 years after the enactment did not alter or revise that original intent.

The proper inquiry is, "*What did the original enactors intend* ***those words*** to mean?" *Those words* at that time were *intended* by the Sixty-fifth Congress to exclude all damages. Perhaps, Congress wrote those words *because* they did not believe those awards were includable in gross income. But there can be no doubt that, at that time, those words were written to exclude all damages awarded in personal injury cases.

Congressmen of that Sixty-fifth Congress, if asked in 1919 what was intended by those words, would have answered, "The words exclude any and all damages, including punitive damages." If the judges and Justices making the decision were taken back to 1920, nearer to the time of enactment, and asked the question they are being asked today, "What do these words mean?" they would find, as a matter of law, that any and all damages are excluded by the words of the statute, including punitive damages. This was the IRS' original understanding of the statute. *Burke*, 112 S.Ct. at 1,875.

The decision of later courts do not reform "original intent," yet courts have cited *Glenshaw Glass*, *supra*, as support for the proposition that §104(a)(2) does not exclude punitive damages. *Glenshaw Glass* does not mandate taxation of all punitive damages in all events. The genius of *Glenshaw Glass* is that punitive damages are income and, *unless otherwise specifically excluded*, taxable. In the express words of this Court in *Glenshaw Glass*, some exclusion of punitive damages is anticipated. It is *this exclusion*, in what is now §104(a)(2), that is anticipated, for there is no other exclusion of punitive damages found in the Internal Revenue Code. *Glenshaw Glass* does not obviate or transform the "original intent" of the enacting Congress. *Glenshaw Glass* anticipates and confirms a specific exclusion for these punitive damages.

After the *Glenshaw Glass* decision in 1955, the Internal Revenue Service, Congress, and the courts continued to approve the original codification which excluded all damages.

Exclusion of punitive damages recovered in personal injury claims under I.R.C. §104(a)(2) was an established administrative practice of the IRS for 66 years from the enactment of section 213(b) in 1918 until 1984. (See Rev. Rul. 58-578, 1958-2 C.B. 38; Rev. Rul. 75-45, 1975-1 C.B. 47; Gen. Couns. Mem. 35,967 (August 27, 1974); Priv. Ltr. Rul. 7304120600A (April 12, 1973).)[1] This long-standing established administrative practice describes the meaning of the statute. These administrative statements came after 1955 when the IRS was well aware of the significance of *Glenshaw Glass*.

In 1956, the administrative practice was formally adopted as Treasury Regulation §1.104-1(c) which expresses the necessity of the inquiry into the "nature of the underlying claim." *Burke*, 112 S.Ct. at 1,870; 1,875; and 1,878. The authority of a Treasury Regulation is a great deal more significant than that of a Revenue Ruling. Treasury Regulation §601-601(a). One significant factor in weighing the authority of this regulation is the length of time it has been in effect. This Regulation had been in effect for 28 years before Rev. Rul. 84-108, 1984-2 C.B. 32 was promulgated. Until after this Court's decision in *Burke* in 1992, neither the IRS nor any court had postulated that the statute created two tests. Treasury Regulation §1.104-1(c) is the expression of one interpretation, long recognized as the only interpretation.

The government adhered to the "original intent" of the statute and 19 years after *Glenshaw Glass* described the plain meaning and the established administrative practice in General Counsel Memorandum 35,967 (August 27, 1974):

> . . . I.R.C. §104(a)(2) is a specific statutory exclusion from gross income within the "except as otherwise provided" clause of I.R.C. §61(a). . . . Therefore, under I.R.C. §104(a)(2), *any damages, whether compensatory or punitive and whether a*

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[1] The General Counsel memorandum and the Private Letter Ruling are not cited nor relied upon as precedent. I.R.C. § 6110(j)(3). Both documents, however, are competent evidence of administrative practice. *Rowan Cos. v. United States*, 452 U.S. 247, 261 n.17, 68 L.Ed.2d 814, 826 n.17 (1981).

> *substitute for income or not*, received on account of personal injury or sickness are excludable from gross income. . . . *There is nothing in the legislative history of I.R.C. §104, or the regulations thereunder indicating that punitive damages awarded in connection with personal injuries should be includable in gross income.*

Twenty years **after** the decision in *Glenshaw Glass*, the Commissioner of the Internal Revenue continued to adhere to the established meaning of the statute in Revenue Ruling 75-45:

> Therefore, under §104(a)(2) any damages, whether compensatory or punitive, received on account of personal injuries or sickness are excludable from gross income.

Rev. Rul. 75-45, 1975-1 C.B. 47. These official statements by the IRS, Treasury Regulation §1.104-1(c), the General Council's Memorandum, *supra*, and Rev. Rule 75-45, define the meaning of the statute at a time closer to its enactment, and evidence a continued adherence to the understood and established interpretation.

The enactor's original intent cannot be reformed administratively by a change in the law 36 years after the enactment. However, the actions and acquiesces of subsequent Congresses, especially in the wake of the significant change in the law brought about by *Glenshaw Glass*, are properly regarded as the intent of those Congresses. (See *Crane*, *supra*, and *Burke*, *supra*.) Section 104(a) here has been re-enacted without material change repeatedly throughout the years. Reenactment and amendment to the statute without change is the most authoritative evidence of Congressional approval of the long standing administrative interpretation of the statute as excluding punitive damages. *Eli Lilly v. EPA*, 615 F.Supp. 811 (S.D. Ind. 1985); *Massachusetts Mutual. Life Ins. Co. v. United States*, 5 Cl.Ct. 581 (1984); and *Crane v. Commissioner*, 331 U.S. 1 (1947).

From the time of the original enactment of §213(b)(6) in 1918 until the publication of Revenue Ruling 84-108 in 1984, 66 years passed during which the statutory provision was not

altered with the *enactment* of nine subsequent Revenue Acts. I.R.C. §104, *with the relevant language unchanged*, was adopted into the 1939 and 1954 Codes. The Treasury Regulation §1.104-1(c), which pertains precisely to this provision, was adopted in 1956, and approved by Congress by those *re-enactments*.

Congress *amended* §104 three times in the nine years following the publication of Rev. Rul. 75-45. (See Pub.L.No. 94-455, §505(e), 1901(a)(17) (adding a new subsection to §(a)); Pub.L.No. 96-465, §2206(e)(1) (giving effect to the Foreign Service Act of 1980); and Pub.L.No. 97-473, §101(a) (enlarging the scope of subsection (a)(2) by adding to that exclusion what would otherwise be the taxable interest component of "structured settlements").) Although the very subsection at issue was amended after the publication of Rev. Rul. 75-45 and *attention to the interpretation of the exclusion was necessary*, Congress did not change the pertinent holding of the Rev. Rul. 75-45 in any one of these amendments. The exclusion of punitive damages was a prior long-standing and consistent administrative practice embodied in the holding of Rev. Rul. 75-45 and in Treasury Regulation §1.104-1(c).

In 1989, Congress once again considered §104(a)(2) and *acted* to limit the exclusion of punitive damages to awards in connection with physical injury or physical sickness only. This Court in *Burke* acknowledged and validated that change in 1992. *Burke*, 112 S.Ct. at 1871 note 6, and 1876 note 3 (Scalia concurring). However, in 1995, the Tenth Circuit joined the Ninth Circuit in its opinion that Congress did not know what it was doing when it enacted the Amendment to §104(a)(2). The Ninth Circuit in *Hawkins* asserted " . . . the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Hawkins*, 30 F.3d at 1,082. The corollary to that principle is even more apt. *The view of a subsequent Commissioner involved in controversial litigation forms an even more hazardous basis for inferring the intent of an earlier Congress.* In 1984, the Commissioner, without impetus from court decision, congressional act, or other relevant source, changed his position on the exclusion of punitive damages in Rev. Rul. 84-108. The Sixth Circuit in

Threlkeld, supra, addressed the litigation position of the IRS in the related Rev. Rul. 85-143.

> We note that in Revenue Ruling 85-143 the Commissioner has announced that it will not follow the Ninth Circuit's decision in *Roemer*. A Revenue Ruling, however, is not entitled to the deference accorded a statute or a Treasury Regulation. *Brook, Inc. v. Commissioner*, 86-2 USTC ¶9646, 799 F.2d 833, 836 n.4 (2nd Cir. 1986). Courts may disregard a Revenue Ruling if it conflicts with the statute it supposedly interprets or with that statute's legislative history or if it is otherwise unreasonable. *Id.* In our opinion, Revenue Ruling 85-143 makes an unreasonable distinction between injury to personal reputation and injury to professional reputation. Therefore we refuse to follow it.

Threlkeld, 88-1 USTC ¶9370 at 83,992. In view of the long standing administrative practice, the plain language of the statute, and the contemporaneous statements of intention by the enacting Congress, the change in 1985 by the Commissioner is an unwarranted administrative legislation. *Burford*, 642 F.Supp. 635.

The actions of the many Congresses, including the Congress which amended the statute in 1989, must weigh heavily in the determination of the meaning of the statute. The Tenth Circuit has gravely misplaced its allegiance when it gives greater weight to the litigation position of the IRS than to the continuing acts and acquiesces of the governmental body charged with making the laws.

Can the intent change after enactment? If no, then the *original intent* of the enacting Congress, although based on an incorrect legal fact, is still that *any and all* those damages are excluded. If the meaning evolves, then the intention of the subsequent Congresses, including the Congress which enacted the 1989 Amendment, is of greatest relevance to the inquiry and not to be summarily dismissed. Cf. *Hawkins, supra*.

As the Tenth Circuit has noted, courts have not applied the revised "original intent" to prohibit exclusion of the awards for damages such as lost wages, business losses, or

losses as the result of injury to personal and business reputation, notwithstanding the fact that these awards are now known to be "otherwise taxable" as well.

> this rational [of an underlying compensatory purpose] is somewhat problematic. If . . . a plaintiff recovers for wages lost due to his being injured in an accident, that amount would be excludable from gross income under §104(a)(2), and thus not taxable. But if he had actually worked his wages would be reportable income subject to taxes; thus the §104(a)(2) exclusion has made him more than whole.

O'Gilvie, 95-2 USTC ¶50,508 at 89,640.

That meaning "intended" by Congress in 1918 of those written words which expressly exclude any damages, including punitive damages, cannot be reformed to exclude only those awards which are compensatory.

(d) The rationale underlying the decision of the Tenth Circuit is contrary to and overrules a long line of settled case law that has been relied upon by taxpayers, counsel, tax advisors, and the IRS to interpret I.R.C. §104(a)(2). Such rationale applies the "compensatory purpose" test rejected by those cases.

The case law has been sparse regarding the exclusion of punitive damages awarded in actual physical injury cases. *Burford*, *supra*, *Horton*, *supra*, and *O'Gilvie*, *supra*. However, the case law with respect to the interpretation of the eight words of I.R.C. §104(a)(2) at issue here has been voluminous. (See *Summary of Cases*, appendix at 51-53.) And, until *Miller*, *supra*, the courts had consistently rejected the "compensatory purpose" test and the "return of capital" rationale.

The IRS first argued in 1972 that only awards which were in the nature of a *return of capital* were excludable. These taxpayers were asking that lost wages awarded because of their personal injuries be excluded from income under §104(a)(2). The IRS argued that the award for lost wages was made to compensate for the economic loss and not as direct

compensation for the personal injury. The courts repeatedly rejected the interpretation that §104(a)(2) prohibited the exclusion because of the *type* of damages and further rejected the proposition that exclusion under §104(a)(2) is limited to damages which are compensatory or are a *return of capital*.[2] **In no reported decision has the fact that an award for lost wages or economic losses is not a return of capital prevented exclusion under §104(a)(2) where the underlying claim was for personal injury.** These courts note that, without a specific exclusion, these items would be taxable but consistently find that §104(a)(2) provides the required specific exclusion. Under the weight of these cases, which hold awards of lost profit and wages excludable, although those awards are ***not a return of capital***, the assertion that the statute has an underlying "compensatory" purpose is insupportable.

The next spate of cases came as the result of the IRS seeking to limit the *type* of award excluded to only awards for *physical* injury. The IRS asked the courts to read the "on account of personal injury" portion of the eight word phrase to mean "on account of *physical* injuries" only. *Roemer v. Commissioner*, 716 F.2d 693 (9th Cir. 1983); and *Threlkeld v. C.I.R.*, 848 F.2d 81 (6th Cir. 1988). Thus the IRS argued that the exclusion was not available for economic loss, such as loss to reputation, etc., because the injury was not physical. *Wolfson v. C.I.R.*, 651 F.2d 1228 (6th Cir. 1981); *Church v. C.I.R.*, 80 TC 1104 (1983); *Roemer, supra*. These attempts to limit the *type* of damages excluded by the words "on account of personal injury" were rejected. These courts rejected the

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[2] *Seay*, 58 TC 32 (1972); *Wolfson*, 651 F.2d 1228 (6th Cir. 1981); *Church*, 80 TC 1104 (1983); *Roemer*, 716 F.2d 693 (9th Cir. 1983); *Threlkeld*, 848 F.2d 81 (1988); *Metzger*, 88 TC 46 (1988); *Bent*, 835 F.2d 67 (3rd Cir. 1987); *Wulf*, 883 F.2d 842 (10th Cir. 1989); *Thompson*, 866 F.2d 709 (4th Cir. 1989); *Byrne*, 883 F.2d 211 (3rd Cir. 1989); *Rickel*, 900 F.2d 655 (3rd Cir. 1990); *Redfield*, 940 F.2d 542 (9th Cir. 1991); *Pistillo*, 912 F.2d 145 (6th Cir. 1990); *Downey*, 97 TC 10 (1991); *Burke*, 929 F.2d 1119 (6th Cir. 1991); *Rice*, 834 F.Supp. 1241 (E.D. Cal. 1993); *McKay*, 102 TC 16 (1994); *Bennett*, 94-1 USTC ¶50,044 (1994).

"compensatory purpose" test which limited the *type of damages* excluded, and uniformly held that once the "underlying claim" for personal injury was found, then *all* damages which flowed from that claim are excludable. The statute was consistently interpreted to apply only the "nature of the underlying claim" test as the beginning and the end of the inquiry. *Burke, supra, Threlkeld, supra, Horton, supra.*

Before the IRS had *lost* the battle to limit the exclusion under §104(a)(2) for damages awarded for non-physical injury, and for wages, business and profit losses, the IRS, as a part of its litigation initiative, brought its administrative statements regarding punitive and physical damages in line with its litigation position in Rev. Rul. 84-108 and Rev. Rul. 85-143, legislating that the exclusion was limited by the *type* of damage received. Even then, the IRS did not suggest the idea that the test for excludability in §104(a)(2) was a dual test. Thus began yet another round of controversy regarding limiting the *type* of damages which would be excluded under §104(a)(2). In 1988, Rev. Rul. 85-143 was rejected by *Threlkeld*. "In our opinion, Revenue Ruling 85-143 makes an unreasonable distinction between injury to personal reputation and injury to professional reputation. Therefore, we refuse to follow it." *Threlkeld, supra.* (Also see discussion at 21, *supra.*)

Just as the decision in *Burke* was beginning to narrow the areas of uncertainty, the comments in *Schleier* regarding application of a "compensatory purpose" test have turned settled areas to quicksand. The application of a "compensatory purpose" test with its "return of capital" rationale in *Schleier* indicates that the lower court decisions in all the preceding cases where the IRS argued for application of the "compensatory purpose" test have been wrongly decided. In each case, those courts determined that there was only one test and that test was the "nature of the underlying claim" test. See footnote 2, *supra*, at 23. To limit the exclusion by the *type of award* that flows from the injury is a stark rejection of all prior case law which had litigated the issue of interpretation of the test that the eight words expressed.

(e) The United States Court of Appeals for the Tenth Circuit has interpreted a federal statute, I.R.C. §104(a)(2), in such a manner that the 1989 amendment to that statute is rendered meaningless.

The inescapable conclusion of the Tenth Circuit's decision in *O'Gilvie*, *supra*, is that §104(a)(2) exempts no punitive damages at any time. Thus the statute, as amended, is void on its face as to exclusion of punitive damages. However, it is evident from the text of the amendment that Congress believed that the statute exempts not only *non-physical damages* received on account of personal injuries, but also exempts *punitive damages* received on account of personal injuries. Section 104(a) as amended states in relevant part:

> Gross income does not include – (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness. . . . Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness.

Taxpayers and their advisers are understandably bewildered and misled by the language of the statute. The taxpayers who follow, in good faith, the directions of the text of the statute or the case law of the Sixth Circuit, will be subject to various reporting and underpayment penalties if the Tenth Circuit is correct.

The Tenth Circuit focuses on the conflict:

> We are further troubled by the language of the 1989 Amendment to §104(a)(2), effective after the instant case was brought, but surely bearing upon the question of congressional intent. . . . The taxpayers contend that this amendment . . . narrowing language, compels the conclusion that punitive damages were excludable under §104(a)(2) before the amendment. . . . The clear implication of Congress' phraseology is that punitive damages in a case involving physical injury or physical sickness are excludable, and were excludable. . . .

O'Gilvie, 95-2 USTC ¶50,508 at 89,640.

In *Hawkins*, Judge Trott dissenting on a panel of three describes the problem:

> [I]f, as the Ninth Circuit majority opinion suggested, punitive damages were taxable both before and after the 1989 Amendment, then the Amendment was meaningless since punitive damages were already taxable, unless the amendment broadened the exclusion, which was untenable. . . . By contrast, the majority is unable to offer a satisfactory explanation of the 1989 Amendment. The majority suggests that *all* punitive damages, both before and after 1989, must be taxable. . . . Unfortunately, this conclusion means that Congress' 1989 Amendment to §104 had no effect because punitive damages were already taxable! Moreover, if Congress wanted to clarify that all punitive damages were taxable, why did the amendment create a distinction between physical and nonphysical injury cases?

Hawkins, 30 F.3d at 1086-87.

This *O'Gilvie* case supplies the first instance in which punitive damages for physical injury were found not to be excluded and the amendment to the statute is directly shown to be meaningless. In *Hawkins*, 30 F.3d 1077, the punitive damages award was made for breach of good faith, not for physical injury. In *Reese*, 24 F.3d 228, the punitive damages award was for sexual harassment, not physical injury. Only in *O'Gilvie* were punitive damages awarded because of a physical injury and *O'Gilvie* is the only physical injury case which prohibits the exclusion to the taxpayers. The other physical injury cases, *Burford* and *Horton*, are in accord with the express meaning of the 1989 Amendment. The amendment to the statute limits the exclusion under §104(a)(2) to only punitive damages awarded in connection with physical injury. If the Tenth Circuit is followed, those punitive damages were not excluded anyway and the amendment is inoperative and invalid.

The Tenth Circuit does not resolve the "troubling" issue of the 1989 Amendment but, in effect, states that Congress didn't know what it was doing.

> It is apparent to us that when Congress was debating the amendment it believed that §104(a)(2) applied to punitive as well as compensatory damages . . . even if that was what Congress believed, it does not "indicate that Congress gleaned the true intent of previous Congresses, only that Congress was aware that courts had recently so interpreted the section." *Hawkins*, 30 F.3d at 1082 n.6.

O'Gilvie, 95-2 USTC ¶50,508 at 89,640.

A better reasoned interpretation of §104(a)(2) and one that comports with Congressional intent is that punitive damages received in actions for both physical and non-physical injuries prior to the 1989 Amendment were excluded under paragraph (2) of I.R.C. §104(a) and the Amendment limited that exclusion to punitive damages awarded in cases involving physical injury or physical sickness only.

In *Burke*, this Court acknowledges the Amendment and affirms its meaning by direct reference to its provisions.

Justice Blackmun states:

> Congress' 1989 Amendment to §104(a)(2) provides further support for the notion that "personal injuries" includes physical as well as nonphysical injuries. Congress rejected a bill that would have limited the §104(a)(2) exclusion to cases involving "physical injury or physical sickness,". . . . At the same time, Congress amended §104(a) to allow the exclusion of *punitive* damages only in cases involving "physical injury or physical sickness."

Burke, 112 S.Ct. at note 6, page 1871. *See also Burke*, 112 S.Ct. 1876, note 3.

The apparent exclusion from taxation on the face of §104(a)(2) is deeply confusing. So long as the case law is not directly on point and the statute is open to "interpretation," the advice given to taxpayers and the reporting of the punitive damages will vary from jurisdiction to jurisdiction and from IRS office to IRS office. In view of the conflict in the circuits, it is incumbent upon the judiciary to clarify this gross contradiction that the case law makes of the statute.

(f) The Tenth Circuit has impermissibly expanded the power of the federal district court to modify its judgments beyond the authority granted by the Federal Rules of Civil Procedure.

There is no doubt that the government was entitled to the extended period of sixty (60) days under F.R.C.P. 4(a) in which to file its notice of appeal. However, the judgment from which it appealed was filed on November 30, 1993, and was amended under Rule 60(a) on December 7, 1993. Amendment of a judgment under F.R.C.P. 60(a) does not toll the time for filing the notice of appeal. The Tenth Circuit states without analysis or reference to statutory authority that the government's cross appeal is filed timely. *O'Gilvie*, 95-2 USTC ¶50,508. (Appendix at 8.) Under no analysis is the Tenth Circuit correct in its holding.

Two questions had to be answered to determine jurisdiction. First, under what authority did the district court make its December 7, 1993 "amendment" to the judgment entered on November 30, 1993? Second, was the time for filing notice of appeal tolled under this authority?

The Federal Rules of Civil Procedure authorize the correction or amendment of a judgment in only certain instances: Rules 52, 59(e), 60(a), and 60(b). (Appendix at 41, 43, and 44.) Rules 52, 59(e) and 60(b) require a motion by a party to amend a judgment. Rule 60(a) corrections may be made upon motion, but motion of a party is not required. *Only Rule 60(a)* authorizes the correction of judgment on the Court's own initiative. Such is the case here. In fact, the only errors in a judgment which a district court *may* correct of its own initiative are those errors arising from clerical mistakes and from oversight or omission as sanctioned by Rule 60(a). The Court's omission in this case of the previously withdrawn decision is the precise type of oversight or omission contemplated by Rule 60(a).

All parties were on prior notice of the decision of the court on that omitted portion of the November 30, 1993 decision. The court had issued **Judgment** on August 26, 1992 concerning the first issue which was withdrawn "subject to

reinstatement at the conclusion of the case" on October 27, 1992. (Appendix at 30.) The **Memorandum and Order** filed on November 30, 1993 expressly stated in its introductory paragraph the result and holding of its clerical omission:

> . . . In a previous opinion, this court held O'Gilvie's punitive damages award was excludable from income tax pursuant to §104(a)(2) of the Internal Revenue Code.

(Appendix at 31.) There was no doubt in anyone's mind that the district court had made a clerical error. Nor was there any doubt concerning the substance of the court's decision.

The decision in the November 30, 1993 **Judgment** was *absolutely dependent* upon the outcome of the first. The first determination, that punitive damages were excluded, was essential to the determination of the second issue of whether the "additional amount" was an additional punitive damage award and, therefore, also exempt from tax under I.R.C. §104(a)(2). If the punitive damage award was taxable, then the "additional amount" would have been taxable in all events whether characterized as interest or additional punitive damage award. The parties were well aware that the decision in favor of the taxpayer on the first summary judgment issue of taxability of punitive damages was essential to the justiciability of the second summary judgment issue. The court's correction to include the omitted portion did not change the decision, but clarified what was understood by all parties to be what the court intended to say. *Blanton v. Anzolone*, 7 Fed. Rules Serv. 3rd 1461, 813 Fed. 1574 (9th Cir. 1987).

Rule 60(a) makes no provision for tolling the period of time for parties to file appeals because of the court's correction. *Miller v. Transamerican Press, Inc.*, 37 Fed. Rules Serv. 2d 850, 709 F.2d 524 (9th Cir. 1983). The district court corrected its omission on December 7, 1993 before either appeal was docketed in the appellate court. Leave of the appellate court to correct the omission was not required.

The defendant's notice of appeal, filed on February 1, 1994, was filed more than sixty days from the date of final judgment on November 30, 1993. The court, on its own initiative under the authority of Rule 60(a), clarified what was

understood by all parties to be what the court intended to say. Correction of the November 30, 1993 **Judgment** by the court on its own initiative under Rule 60(a) does not toll the period for filing an appeal. Defendant's appeal was not timely filed.

The determination by the Tenth Circuit that no statutory authority is required for amendment of a clerical error impermissibly expands the power and authority of the district court to alter and amend its decisions.

CONCLUSION

Petitioner Kelly M. O'Gilvie respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit in these matters.

Respectfully submitted,

LINDA D. KING, Counsel
6135 E. Central
Wichita, Kansas 67208
(316) 686-2000

APPENDIX CONTENTS

Pursuant to Supreme Court Rule 14(h), following this page are copies of the following documents:

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KELLY M. O'GILVIE, Plaintiff-Appellant/ Cross-Appellee, v. UNITED STATES OF AMERICA, Defendant-Appellee/ Cross-Appellant.	)	Nos. 94-3004 & 94-3031
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. KEVIN M. O'GILVIE, STEPHANIE L. O'GILVIE, Defendants-Appellees.	)	No. 94-3058

Appeals from the United States District Court
for the District of Kansas
(D.C. Nos. 90-CV-1075 and 92-1358-MLB)

(Filed Sep. 19, 1995)

Kenneth W. Rosenberg, Attorney, Tax Division (Loretta C. Argrett, Assistant Attorney General, and Kenneth L.

Greene, Attorney, Tax Division, Of Counsel: Randall K. Rathbun, United States Attorney, with him on the briefs), Department of Justice, Washington, D.C., for the United States.

Linda D. King of Wilkinson & King, Wichita, Kansas, for the O'Gilvies.

Before MOORE and LOGAN, Circuit Judges, and DAUGHERTY, District Judge.*

LOGAN, Circuit Judge.

The substantive issue raised in these consolidated appeals is whether punitive damages recovered in a case involving physical injury are excluded from gross income under § 104(a)(2) of the Internal Revenue Code (I.R.C.), 26 U.S.C. § 104(a)(2), a question which has split the circuits four to one.[1] We must also decide three threshold questions relating to our appellate jurisdiction.

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* The Honorable Frederick A. Daugherty, Senior United States District Judge, United States District Court for the Western, Eastern and Northern Districts of Oklahoma, sitting by designation.

[1] *Compare Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994) and *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990) *with Horton v. Commissioner*, 33 F.3d 625, 630 (6th Cir. 1994).

I

The punitive damages that are the subject of these appeals were awarded in a products liability action filed after Betty O'Gilvie died of toxic shock syndrome. Her widower, Kelly M. O'Gilvie, acting as administrator of her estate and as guardian of their minor children, Kevin M. O'Gilvie and Stephanie L. O'Gilvie, brought suit against International Playtex, Inc., which manufactured the tampons used by Betty O'Gilvie. The jury awarded actual damages of $1,525,000 and punitive damages of $10,000,000. *See O'Gilvie v. International Playtex, Inc.*, 609 F. Supp. 817, 818 (D. Kan. 1985), *aff'd in part and rev'd in part*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). The district court ordered a remittitur of the punitive award to $1,350,000, 609 F. Supp. at 819-20, but on appeal this court ordered reinstatement of the full punitive award, 821 F.2d at 1448-49.

In 1988, the O'Gilvie estate distributed the net proceeds of the punitive damages award to the beneficiaries, the taxpayers here. After attorney's fees and expenses the net proceeds were $4,967,292. Each of the three taxpayers reported their share of the punitive damages on their individual federal income tax returns for the 1988 tax year in the following amounts:

Kelly M. O'Gilvie	$2,483,646
Kevin M. O'Gilvie	$1,241,823
Stephanie L. O'Gilvie	$1,241,823

In August 1989, taxpayer Kelly M. O'Gilvie filed a claim for refund with respect to his 1988 income taxes, asserting that punitive damages were excluded from gross income under I.R.C. § 104(a)(2) as damages

received "on account of personal injury."[2] When the Internal Revenue Service took no action on his refund claim he filed suit against the United States to recover the refund plus interest. He later filed an amended complaint in his suit, adding a claim for the refund of taxes paid on interest on the portion of the punitive damages award that was the subject of the remittitur.[3] The parties filed cross-motions for summary judgment, each asserting there was no genuine issue of material fact and that the taxability of punitive damages could be decided as a matter of law.

In November 1989, taxpayers Kevin M. O'Gilvie and Stephanie L. O'Gilvie filed claims for refunds asserting the punitives were excludable from income.[4] The IRS approved, and after submitting them to Congress as

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[2] He sought a refund of $695,421, the tax that resulted from including the punitive damages in income.

[3] Kelly O'Gilvie had filed in February 1991 a second administrative claim for refund for the 1988 tax year. That claim asserted an overpayment of taxes for 1988 in addition to the overpayment previously claimed with respect to the punitive damages. The alleged additional overpayment arose from interest he received on the portion of the punitive damages award that was remitted by the district court but reinstated by our court. The additional overpayment claimed was the tax paid on interest received for the period between the entry of the district court's original judgment, which was for $1,350,000, and the judgment entered after the remand, which was in the amount of $10,000,000. The interest computed at the federal postjudgment rate pursuant to 28 U.S.C. § 1961 totalled $875,000. The claim sought a refund of $260,437 in taxes paid on that interest. The Internal Revenue Service took no action on that claim.

[4] Kevin and Stephanie O'Gilvie each requested a refund of $346,319.

required for large refunds by I.R.C. § 6405, processed the refunds. Kevin and Stephanie received refund checks in July 1990. Two years later, however, the IRS filed an action against each of them for recovery of an erroneous refund under I.R.C. § 7405, asserting the punitive damages award was taxable. The parties in that case agreed to be bound by the decision in Kelly O'Gilvie's refund suit.

On May 26, 1992, the district court issued a memorandum and order in the refund suit, finding that the punitive damages were taxable. Kelly O'Gilvie moved for reconsideration of the district court's opinion, and on August 26, 1992, the district court reversed itself and entered a judgment holding that punitive damages were excludable from gross income under § 104(a)(2). On October 26, 1992, the United States filed a notice of appeal to our court from the August 26 judgment.

On November 11, Kelly O'Gilvie filed a motion for summary judgment asserting that the interest on the portion of the punitive damages award that was the subject of the remittitur was excludable from income under § 104(a)(2) as a matter of law. The United States opposed that motion, arguing that the interest was taxable and requesting summary judgment in its favor. Because of the remaining issue concerning taxability of the interest, on October 27, 1992, the district court entered an order withdrawing the August 26 judgment.[5] On November 30,

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[5] The district court order stated:

> On August 26, 1992, pursuant to a Memorandum and Order of even date, the court entered judgment in favor of the plaintiff on plaintiff's motion for summary judgment (Doc. 34). Since that time, it has been

1993, the district court issued a memorandum and order finding that the interest during the interim period was taxable, and granted the government summary judgment on that issue. On December 7, 1993, the district court entered an amended order stating:

> IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order filed and docketed on the 26th day of August, 1992, the motion for reconsideration filed by the plaintiff is granted and his motion for summary judgment is also granted; IT IS FURTHER ORDERED that pursuant to the Memorandum and Order filed and docketed on the 30th day of November, 1993, the motion for summary judgment filed by the defendant is granted and the Court holds that the "additional Amount" on $8.65 million from the date of the district court's entry of remittitur to the district court's entry of judgment in accordance with the Tenth Circuit's mandate was interest and is taxable as income.

U.S. App. 57.

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brought to the court's attention that there is an issue which was raised in the amended pretrial order filed April 23, 1992 (Doc. 25) which has not yet been fully briefed by the parties. Both parties desire to have the issue ruled upon before a final judgment is entered.

Accordingly, pursuant to Rule 60(a), Fed. R. Civ. P., the judgment entered on August 26, 1992 is hereby withdrawn, subject to reinstatement at the conclusion of the case.

IT IS SO ORDERED.

U.S. App. 46.

On January 5, 1994, Kelly O'Gilvie filed a timely notice of appeal (No. 94-3004). On February 1, 1994, the government filed its cross-appeal (No. 94-3031).[6]

II

Taxpayer Kelly O'Gilvie argues that we do not have subject matter jurisdiction over the government's cross-appeal in No. 94-3031 because the notice of appeal was not timely. Taxpayers Kevin and Stephanie O'Gilvie assert that we lack jurisdiction over the government's appeal in No. 94-3058 because the government's suit against them for erroneous refund was untimely and because federal courts do not have jurisdiction to review refunds that have been approved by the Joint Committee on Taxation under I.R.C. § 6405. We address these issues in turn.

A

When the United States is a party in a civil case, "the notice of appeal may be filed by any party within 60 days" after the date of entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1). The United States filed its notice of appeal more than sixty days after the district court entered its judgment of November 30, 1993, but less than sixty days after entry of the amended judgment of December 7, 1983. Thus, if the November 30 judgment was final and appealable the government's

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[6] No. 94-3058 is the government's appeal from the district court order of February 22, 1994, dismissing the action for erroneous refund against Kevin and Stephanie O'Gilvie.

appeal was not timely; on the other hand, if the amended judgment of December 7 was the final and appealable order the government's appeal was timely.

Taxpayer Kelly O'Gilvie asserts that the amended judgment of December 7 merely corrected a clerical error in the first judgment under Fed. R. Civ. P. 60(a), and thus the time to appeal ran from November 30, 1993. *See White v. Westrick*, 921 F.2d 784 (8th Cir. 1990). However, a careful reading of all of the memoranda, orders, and "judgments" entered in this case indicates that the October 27 order withdrew the August 26 judgment on the punitives issue. Thus the district court did not enter judgment on the punitive damages issue until December 7. The government's cross-appeal is timely.

B

Taxpayers Kevin O'Gilvie and Stephanie O'Gilvie argue that the government's complaint seeking recovery of refunds made to them was time-barred. "Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund." I.R.C. § 6532(b). The complaint filed on July 9, 1992, alleged that the IRS refunded the taxes at issue on July 9, 1990. Taxpayers admit that they received the refund checks in the mail on July 9, 1990, but argue that a refund is made for purposes of § 6532(b) when the check is mailed, rather than when it is received. Taxpayers assert that because the checks had to have been mailed before July 9, 1990, the suit was filed more than two years after the refund was made. The question

thus is whether a refund is "made" under § 6532(b) when the check is mailed or when it is received.

Taxpayers cite *United States v. Steel Furniture Co.*, 74 F.2d 744 (6th Cir. 1935), for their assertion that § 6532(b) must be construed liberally in their favor. That case, however, construed the scope of the predecessor of § 7405, which was not a statute of limitations provision. In interpreting the predecessor to the statutory limitations provision in § 6532(b) the Supreme Court stated that "[t]he Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has 'clearly manifested its intention' to raise a statutory barrier." *United States v. Wurts*, 303 U.S. 414, 416 (1938). Further, generally statutes of limitations sought to be applied against the government are strictly construed in favor of the government. *See, e.g., Badaracco v. Commissioner*, 464 U.S. 386, 391 (1984).

Although we have not addressed the precise question whether a refund is "made" under the current § 6532(b) when the check is mailed or when it is received, in *Paulson v. United States*, 78 F.2d 97 (10th Cir. 1935), we held that the date a refund was made for purposes of the predecessor of § 6532(b) was the date of receipt rather than the date the Commissioner approved and signed the schedule of refunds. As we stated there,

> [T]he refund is made when the money is paid. Refund means to pay back, return, restore, make restitution. That is the ordinary and popular concept of the word, and in the absence of a contrary indication, it must be presumed that the Congress used it in that generally accepted

> sense. The return, restoration, and restitution of the money is made when the check in payment of the obligation is delivered.

Paulson, 78 F.2d at 99. Our *Paulson* decision is supported by *Wurts*, which stated that "[t]he Commissioner's signature on a schedule of overassessments does not finally establish a claimant's right to a refund . . . [because he could later] – even after a check was signed and mailed – cancel the payment." 303 U.S. at 417-18.

Taxpayers assert that if the date of mailing is in evidence, as it impliedly is here, that as between the date of mailing and the date of receipt, the date of mailing is the time from which the statute runs. But as we stated in *Paulson*, "[o]rdinarily a statute of limitation does not begin to run until a suit could be brought." 78 F.2d at 99. Here, the government could not have brought suit to recover the refund until the taxpayers had received the refund checks on July 9, 1990. Thus, the statute of limitations began to run on July 9, 1990, when taxpayers received their refund checks. *Paulson*, 78 F.2d at 99; *see United States v. Carter*, 906 F.2d 1375, 1377 (9th Cir. 1990) ("refund is considered to have been made on the date the taxpayer received the refund check"); *see also* 14 Jacob Mertens, Jr., *The Law of Federal Income Taxation* § 54(a).71 (rev. ed. 1993) (§ 7405 suit must be brought "within two years from the date of delivery of the refund check"); Michael I. Saltzman, *IRS Practice and Procedure* ¶ 14.08[2][g] at 14-60 (2d ed. 1991) (same). The government's complaint, filed exactly two years later, was timely.

C

Taxpayers Kevin and Stephanie O'Gilvie also assert that because their refunds were submitted to the Joint Committee on Taxation for approval under I.R.C. § 6405(a), the United States cannot seek judicial review. Section 6405(a) at that time provided

> [n]o refund or credit of any income . . . tax . . . in excess of $200,000 shall be made until after the expiration of 30 days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and the summary of facts and the decision of the Secretary, is submitted to the Joint Committee on Taxation.[7]

Plaintiffs assert that judicial review of the Secretary's approved decision would usurp congressional legislative power.

We first note that under § 6405(a) the Joint Committee merely received a report of the refunds and did not object to them, thus the Committee did not affirmatively approve the refunds. *See Philadelphia & Reading Corp. v. Commissioner*, 944 F.2d 1063, 1067 (3d Cir. 1991) ("If the Joint Committee does not reject the refund [reported under § 6405(a)] within the thirty-day period, the IRS must then process the refund."). Once the IRS has submitted its report, summary of facts and decision of the Secretary to the Joint Committee on Taxation and that

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[7] A 1990 amendment increased the amount required to be submitted to the Joint Committee from $200,000 to $1,000,000, *see* Pub. L. No. 101-508, § 11834(a), 104 Stat. 1388, 1388-560 (1990).

Committee has passed on the report, we see no constitutional or statutory impediment to judicial review of refunds. *Cf. Oxford Life Ins. Co. v. United States*, 574 F. Supp. 1417, 1428 (D. Ariz. 1983), *aff'd in part and rev'd in part on other grounds*, 790 F.2d 1370 (9th Cir. 1986) (holding that it could not rule on whether government was entitled to recover refund until after the IRS submitted its report, summary of facts and decision of Secretary to the Joint Committee on Taxation pursuant to 26 U.S.C. § 6405).

We believe that § 6405 was enacted so that the Committee could be involved in oversight of payment from the Treasury, not to prevent judicial review of refund decisions. As the government points out, if we were to accept taxpayers' argument, the government could never seek review of a refund that had been approved by the Committee. We hold that the district court had jurisdiction to review the refund, and thus we have jurisdiction to review the district court's determination.

III

We now address the substantive issue whether punitive damages in a products liability action for wrongful death are excludable from gross income under § 104(a)(2). We review this issue of law de novo. *See Estate of Moore v. Commissioner*, 53 F.3d 712, 714 (5th Cir. 1995).

Section 61(a) of the Internal Revenue Code defines "gross income" broadly: "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived." I.R.C. § 61(a). Thus, Congress intended to "tax all gains except those specifically

exempted." *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 430 (1955). Plaintiffs assert that the punitive damages award in the instant case were excluded from gross income by I.R.C. § 104(a)(2), which provided:[8]

> § 104. Compensation for injuries or sickness. . . . [G]ross income does not include –
>
> . . . .
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness.[9]

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[8] The language quoted is the version of the statute in effect at the time the punitives were awarded to the O'Gilvies, and thus it controls here. The statute was later amended, *see* Pub. L. No. 101-239, § 7641(a), 103 Stat. 2106, 2379 (1989). The text of this amendment is discussed *infra*.

[9] The district court initially found that the punitive award did not fit the § 104(a)(2) exception, implicitly rejecting plaintiffs' assertion that the plain language of the statute excludes any damages received as a result of the underlying personal injury lawsuit. The court thus found that the phrase "on account of" was ambiguous, and that the government's view that punitive damages are not awarded "on account of personal injury" was more reasonable when viewed in light of the statute's underlying purpose "to assist taxpayers burdened with sickness or injury and make them whole from a previous loss of personal rights." D.C. memo and order of May 26, 1992, U.S. App. 31 (citing *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990)). The district court determined that the punitive award was not received "on account of personal injury" and therefore was gross income.

The same day the district court issued its initial decision, the Supreme Court issued an opinion in *United States v. Burke*, 504 U.S. 229 (1995), which addressed whether settlement of a Title VII back pay claim was excludable under § 104(a)(2). On

Four Circuits have held that noncompensatory punitive damages are not received "on account of" personal injuries; therefore they are not excludable from gross income under § 104(a)(2). *See Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994); *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990). These decisions begin with the threshold determination that the language of § 104(a)(2), that gross income does not include "the amount of any damages received . . . *on account of* personal injuries or sickness," is ambiguous. They then interpret the statute and determine that Congress intended to exclude only damages awarded to *compensate* for a tort-like injury, relying on some of or all of the following: (1) the statutory context and title, (2) the principle that exclusions from income should be construed narrowly, (3) the policy and legislative history of § 104, (4) a Treasury Revenue Ruling addressing this issue, (5) the 1989 amendment to § 104(a)(2), and (6)

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plaintiff's motion for reconsideration, the district court determined that the *Burke* decision "altered the analysis" and required a reversal of its decision. D.C. memo and order of August 26, 1992, U.S. App. 42-44. It stated that "[i]n our previous order, this court focused on the nature of the punitive damage award itself, rather than the nature of the underlying claim. . . . The [*Burke*] opinion makes clear that the proper inquiry for purposes of § 104(a)(2) is on the nature of the claim underlying the taxpayers' damages award." *Id.* at 43. Because this is a tort-like suit, the court found that the punitive award was excludable from income under § 104(a)(2) and granted plaintiff's motion for summary judgment.

Supreme Court cases discussing § 104(a)(2) in other contexts. Because punitive damages (generally) are not intended to compensate, but to deter and punish, these circuits conclude that § 104(a)(2) does not exclude punitive damages from income.[10]

In contrast, the Sixth Circuit recently held that the plain language of § 104(a)(2) unambiguously exempts punitives from gross income, *see Horton v. Commissioner*, 33 F.3d 625, 630 (6th Cir. 1994). The *Horton* Court found that the "plain meaning of the broad statutory language [of § 104(a)(2)] simply does not permit a distinction between punitive and compensatory damages." *Id.* at 631 (citation omitted). That opinion relied on the Supreme Court's opinion in *United States v. Burke*, 504 U.S. 229 (1992).

The issue in *Burke* was whether a claim under Title VII of the Civil Rights Act of 1964 sought to redress "a personal injury" under § 104(a)(2). *Id.* at 237. The Court stated that the statute was ambiguous and the legislative history was not instructive. Therefore, the Court relied on the regulation relating to the statute, which defined "damages" as "an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights." 26 C.F.R. § 1.104-1(c). The Court noted that under traditional tort law, a variety of remedies are available, including pain and suffering, emotional distress, harm to reputation, and punitive damages. Because Title VII does

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[10] These courts looked to state law to determine whether punitives in each case were compensatory in nature, and found they were not. The O'Gilvies do not argue here that the punitives they received are compensatory in nature.

not provide these types of remedies, the Court concluded that a Title VII claim was not a type of personal injury claim.

Relying on *Burke*, the *Horton* opinion concluded that in determining whether an award is excludable under § 104(a)(2), it should focus exclusively " 'on the nature of the claim underlying [the taxpayer's] damages award.' " *Horton*, 33 F.3d at 631 (quoting *Burke*, 504 U.S. at 237). Further, it stated "[t]his is 'the beginning and end of the inquiry.' " *Horton*, 33 F.3d at 631 (citation omitted).[11]

The flaw in the *Horton* analysis is that *Burke* focused on the nature of the claim to determine if it involved a personal injury under § 104(a)(2); it did not address whether punitive damages were "received on account of" personal injuries or sickness and thus excludable under § 104(a)(2). *See Wesson*, 48 F.3d at 901. This view of *Burke* is supported by the recent opinion in *Commissioner v. Schleier*, 115 S. Ct. 2159 (1995).

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[11] The *Horton* court stated that because the taxpayer's claim was for a personal, physical injury, the entire recovery, including punitives, were received "on account of" their personal injuries. *Horton*, 33 F.3d at 631. It determined that the statute was not amenable to distinctions between punitive and compensatory damages. It also relied to some extent upon the fact that punitive damages in Kentucky serve a compensatory function. While superficially this appears to be a basis for distinguishing *Horton*, the Sixth Circuit broadly rejected the suggestion that even noncompensatory punitive damages should be included in gross income. *See id.* at 631-32.

Schleier addressed whether ADEA liquidated damages are excludable under § 104(a)(2), holding that they are not. The Supreme Court clarified that

> the plain language of § 104(a)(2), the text of the applicable regulation, and our decision in Burke establish two independent requirements that a taxpayer must meet before a recovery may be excluded under § 104(a)(2). First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is "based upon tort or tort type rights"; and second, the taxpayer must show that the damages were received "on account of personal injuries or sickness."

Id. at 2167. Thus *Schleier* made plain that *Horton*, and the district court in the instant case, misconstrued *Burke* as holding that § 104(a)(2) required *only* that there be a tort-type injury.[12]

Neither the *Burke* nor the *Schleier* Court addressed the question whether the phrase in § 104(a)((2) "on account of" personal injuries is ambiguous. With respect to this we agree with the four circuits that have found it is susceptible of at least two meanings:

> [T]he language "on account of" [may] describe a causal relationship between damages and injury according to which damages are received "on

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[12] *Schleier* further aids our analysis by its statement that "each element of [a hypothetical] settlement is recoverable not simply because the taxpayer received a tort settlement, but rather because *each element* of the settlement satisfies the requirement . . . that the damages were received 'on account of personal injuries or sickness.' " *Schleier*, 115 S. Ct. at 2164 (emphasis added).

> account of" a personal injury whenever a showing of personal injury is a prerequisite for the award of those damages. In other words, any damages ultimately received in a case involving personal injury are damages received "on account of" that personal injury. [Another interpretation is] one which defines a causal relationship according to which damages are received "on account of" personal injuries only when the injury in and of itself justifies such damages. Under [this] interpretation, punitive damages are not encompassed by the exclusion, because those damages are received, not because of a personal injury, but in large part "on account of" a defendant's egregious conduct and the jury's desire to punish and deter such conduct.

Reese, 24 F.3d at 230-31.[13]

Thus, "[s]ection 104(a)(2) could mean that all damages recovered in a personal injury suit are excluded, or it could mean that only those damages that purport to compensate the plaintiff for the personal injury suffered are received on account of personal injury." *Wesson*, 48 F.3d at 897. Because the phrase "on account of personal injury" is ambiguous, we must ascertain what Congress intended. In doing so, we look to the design and language of the statute as a whole, as well as to external aids

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[13] Similarly, *Miller* explained that "on account of" suggests causation, but that causation could be either "but-for causation" – i.e., the plaintiff would not have recovered punitives but for the injury, or it could be sufficient causation – e.g., personal injury alone does not sustain a punitive damages award, a plaintiff must also show egregious conduct. *Miller*, 914 F.2d at 589-90.

that may reveal Congress' intent. *See Crandon v. United States*, 494 U.S. 152, 158 (1990).

The title of § 104, "Compensation for injuries or sickness," suggests that Congress intended "to exclude [from gross income] damages which *compensate* a taxpayer for injuries." *Hawkins*, 30 F.3d at 1083 (emphasis added). All of the subsections of § 104 address replacement for losses resulting from injury or sickness, and thus are compensatory in nature.[14] Read in context, then, § 104(a)(2) logically addresses compensatory payments. *Reese*, 24 F.3d at 231 (citing *King v. Saint Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("meaning of statutory language, plain or not, depends on context")). This restrictive reading of § 104(a)(2) is bolstered by "the default rule of statutory interpretation that exclusions from income must be narrowly construed." *Schleier*, 115 S. Ct. at 2163 (quoting *Burke*, 504 U.S. at 248).

We also look to the legislative history to construe an ambiguous statutory phrase. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) (statute must be construed in light of legislative purpose). The Federal Circuit extensively discussed the legislative history of § 104(a)(2) in *Reese*, 24 F.3d at 232-33. The predecessor statute to § 104,

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[14] "Section 104(a)(1) exempts amounts received under workmen's compensation acts; section 104(a)(3) exempts amounts received through accident or health insurance; section 104(a)(4) exempts amounts received as a pension, annuity, or similar allowance for personal injuries or sickness; and section 104(a)(5) exempts amounts received as disability income." *Reese*, 24 F.3d at 231.

§ 213(b)(6) of the Revenue Act of 1918, was enacted because:

> Under the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income. The proposed bill provides that such amounts shall not be included in gross income.

H.R. Rep. No. 767, 65th Cong. 2d Sess. 9-10 (1918) (quoted in *Reese*, 24 F.3d at 233). The Federal Circuit concluded that the § 104 exclusions are based on the theory of "conversion of capital assets," and that "it would be inconsistent with the legislative history to treat punitive damages as excludable from income, since punitive damages in no way resemble a return of capital." 24 F.3d at 233 (citing *Glenshaw Glass*, 348 U.S. at 432 n.8 ("The long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital cannot support exemption of punitive damages. . . . Damages for personal injury are by definition compensatory only.")).

Other circuits have found the idea that § 104(a)(2) is limited to compensatory damages consistent with the supposed underlying purpose of § 104 to make the taxpayer whole. *See, e.g., Hawkins*, 30 F.3d at 1083-84. However, this rationale is somewhat problematic. If, for example, a plaintiff recovers for wages lost due to his being injured in an accident, that amount would be excludable from gross income under § 104(a)(2), and thus

not taxable. But if he had actually worked his wages would be reportable income subject to taxes; thus the § 104(a)(2) exclusion has made him more than whole. *See Hawkins*, 30 F.3d at 1087 (Trott, J., dissenting).

We are further troubled by the language of the 1989 amendment to § 104(a)(2), effective after the instant case was brought, but surely bearing on the question of congressional intent. The amendment added the provision that "Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." The taxpayers contend that this amendment, which uses narrowing language, compels the conclusion that punitive damages were excludable under § 104(a)(2) before the amendment.

> Revised section 104 utilizes a double negative. . . . Since punitive damages in a case not involving physical injury or physical sickness or singled out as being includable in gross income, the clear implication of Congress' phraseology is that punitive damages in a case involving physical injury or physical sickness are excludable, and were excludable even before the amendment.

Horton, 33 F.3d at 631 n.12; *see also Hawkins*, 30 F.3d at 1086-87 (Trott, J., dissenting) (stating that if punitive damages were taxable before and after the amendment, as Ninth Circuit majority held, the amendment was meaningless because punitive damages were already taxable).[15]

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[15] Another way to read the amendment is to assume all punitive damages were taxable before 1989 and the amendment

The Ninth and Fifth Circuits have rejected this argument, pointing out that " 'Congress may amend a statute simply to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases.' " *Wesson*, 48 F.3d at 901 (quoting *Hawkins*, 30 F.3d at 1082). These courts reasoned that Congress adopted the amendment in part to overrule then-recent cases which held that damages received in non-physical injury cases were excludable under § 104(a)(2). *See Threlkeld v. Commissioner*, 848 F.2d 81, 83-84 (6th Cir. 1988); *Roemer v. Commissioner*, 716 F.2d 693, 700 (9th Cir. 1983); *see also Miller v. Commissioner*, 93 T.C. 330 (1989) (later reversed, *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990)).

The legislative history of the 1989 amendment indicates the original House of Representatives bill would have made all damages received in non-physical injury cases taxable. *See* H.R. Rep. No. 101-247, 101st Cong., 1st Sess. at 1354-55, *reprinted in* 1989 U.S.C.C.A.N. at 1906, 2824-25. The Senate refused to pass the House version, and the final bill was a compromise. *See* H.R. Rep. No. 101-386, 101st Cong., 1st Sess. at 623, *reprinted in* 1989 U.S.C.C.A.N. at 3225-26. It is apparent to us that when Congress was debating the amendment it believed that § 104(a)(2) applied to punitive as well as compensatory damages. As the *Hawkins* court pointed out, however, even if that was what Congress believed, it does not

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was intended to exclude from gross income punitives in physical injury cases. However, if that was the case, Congress could simply have amended § 104 to read: "[p]unitive damages in cases involving physical injury or sickness are excludable." *Hawkins*, 30 F.3d at 1087 (Trott, J., dissenting).

"indicate that Congress gleaned the true intent of previous Congressess [sic], only that Congress was aware that courts had recently so interpreted the section." *Hawkins*, 30 F.3d at 1082 n.6. Further, if Congress was concerned primarily with nonphysical injury cases, it simply may not have considered punitive damages received in physical injury cases or it may have been " 'deferring to the courts' " on this issue. *Id.* at 1082 n.7 (citation omitted.)[16] The Ninth Circuit expressed doubt, given its belief that excluding punitive damages is inconsistent with § 104(a)(2)'s title and purpose, that Congress intended to exclude any noncompensatory punitive damages. However, that court "express[ed] no opinion on the excludability of punitive damages received after 1989 in physical injury cases," and expressed a "hope that Congress will shortly clear up the issue." *Id.*

We believe that using the amendment to interpret Congress' intent in 1954 (or 1918) is a questionable practice, particularly because of the long lapse of time and because the legislative history of both the original statute and the amendment are not enlightening. *See Wesson*, 48 F.3d at 901 (" 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one' ") (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). Even if we were to agree with the Sixth Circuit's *Horton* opinion that the 1989 amendment at the very least suggests punitives were excludable under § 104 before the

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[16] The court also stated that "even if the 1989 amendment makes punitive damages received in physical injury cases excludable, this implication could be inadvertent." 30 F.3d at 1082 n.7.

amendment, much of its reasoning, which is similar to that of the district court in the instant case, was undermined by the Supreme Court in *Schleier*.

In sum, it is not clear whether Congress intended to exclude punitive damages from income under § 104(a)(2). Although "good reasons tug each way" in this case, we need not decide "which tug harder," because we must follow the default rule that exclusions from income are narrowly construed. *Burke*, 504 U.S. at 248 (Souter, J., concurring). We thus join the majority of the circuits that have addressed this issue in holding that § 104(a)(2) does not exclude punitive damages from income.[17]

REVERSED.

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[17] Because we have determined that punitive damages are not excludable from income, we need not address Kelly O'Gilvie's argument that interest on the portion of punitive damages that was subject to the remittitur constituted a punitive damages award.

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

KELLY M. O'GILVIE

JUDGMENT IN A CIVIL CASE

v.

(Filed May 26, 1992)

UNITED STATES OF AMERICA

CASE NUMBER: 90-1075

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order filed and docketed on the 26th day of May, 1992, the motion for summary judgement filed by the defendant is granted.

May 26, 1992
Date

RALPH L. DeLOACH
Clerk

Entered on docket 5/26/92

/s/ B. Hatchett
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Kelly M. O'Gilvie Plaintiff, v. United States of America Defendant.	(Filed Aug. 26, 1992) CIVIL ACTION NO. 90-1075-B

MEMORANDUM AND ORDER

This matter comes before the court on O'Gilvie's motion for reconsideration (Doc. 28) of the court's May 26, 1992 order granting summary judgment to the government. The court held O'Gilvie's punitive damages award was not excluded from income tax under 26 U.S.C. § 104(a)(2), which provides in relevant part that "gross income does not include –

"(2) the amount of any damages received . . . on account of personal injuries . . . "

O'Gilvie contends the recent decision of the United States Supreme Court in *U.S. v. Burke*, 60 U.S.L.W. 4404 (U.S. May 26, 1992) has altered the analysis used by this court in arriving at its decision and requires the decision to be reversed. Additionally, O'Gilvie contends this court misapprehended his position on the applicability of the 1989 amendments to § 104(a)(2).

The issue decided by the Supreme Court in *Burke* was "whether a payment received in settlement of a backpay

claim under Title VII . . . is excludable from the recipient's gross income under § 104(a)(2)." *Id.* The Court first explained that the term "personal injuries" is linked to the existence [sic] a tort claim against the payor. *Id.* at 4405. Thus, the taxpayers were required to show that Title VII, the legal basis for their recovery of backpay, redressed a tort-like personal injury. The Court analyzed the remedies[1] available to persons subjected to unlawful discrimination under Title VII and found nothing in the statute's remedial scheme that compensated a plaintiff for any of the traditional harms associated with personal injury. *Id.* at 4406-07. Accordingly, the Court held Title VII claims did not redress tort-like personal injuries within the meaning of § 104(a)(2) and therefore the award under Title VII was *includable* as gross income. *Id.* at 4407.

In our previous order, this court focused on the nature of the punitive damage award itself, rather than the nature of the underlying claim. In light of *Burke*, we believe our focus was misplaced. The Supreme Court's opinion makes clear that the proper inquiry for purposes of § 104(a)(2) is on the nature of the claim underlying the taxpayers' damages award. *Id.* at 4406. As we recognized in our previous order, the underlying suit giving rise to O'Gilvie's recovery of punitive damages is indisputedly tort-like in nature. Slip opinion at 3. Accordingly, the court believes its previous order is contrary to *Burke* and must be reversed.

O'Gilvie also argues this court mistakenly believed he agreed the 1989 amendment was inapplicable. The

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[1] The court noted that remedial principles figure prominently in the definition of torts. *Id.* at 4405.

court noted in footnote 2 of its order that the amendment became effective on July 10, 1989. Both O'Gilvie and the government agree the punitive damage award was received prior to that date. The parties thus agreed the amendment does not *apply* to this case.

The court understands O'Gilvie's argument to be that the amendment served to confirm his position that the punitive damage award is not includable in gross income. In *Burke*, the Supreme Court noted: "Congress' 1989 amendment to § 104(a)(2) provides further support for the notion that 'personal injuries' includes physical as well as non-physical injuries. . . . At the same time, Congress amended § 104(a)(2) to allow the exclusion [from gross income] of punitive damages only in cases involving 'physical injury. . . . ' " *Id.* at 4406, n. 6. While this *dicta* appears to support O'Gilvie's position, it is unnecessary to resolve the applicability of the 1989 amendments in view of this court's decision on reconsideration.

The motion for reconsideration (Doc. 28) is hereby granted and O'Gilvie's motion for summary judgment (Doc. 15) is sustained.

IT IS SO ORDERED.

At Wichita, Kansas, this 26th day of August, 1992.

/s/ Monti L. Belot
Monti L. Belot
United States
District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

KELLY M. O'GILVIE
Plaintiff

v.

UNITED STATES OF AMERICA
Defendant

JUDGMENT IN A CIVIL CASE

(Filed Aug. 26, 1992)

CASE NUMBER: 90-1075-B

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order filed and entered on the docket 8/26/92 that the plaintiff's motion for reconsideration (Doc. 28) is hereby granted and plaintiff O'Gilvie's motion for summary judgment (Doc. 15) is sustained.

ENTERED ON THE DOCKET
DATE: 8-26-92

August 26, 1992
Date

RALPH L. DeLOACH
Clerk

/s/ V. Williams
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Kelly M. O'Gilvie Plaintiff, v. United States of America Defendant.	**CIVIL ACTION** No. 90-1075-B (Filed Oct. 27, 1992)

ORDER

On August 26, 1992, pursuant to a Memorandum and Order of even date, the court entered judgment in favor of the plaintiff on plaintiff's motion for summary judgment (Doc. 34). Since that time, it has been brought to the court's attention that there is an issue which was raised in the amended pretrial order filed April 23, 1992 (Doc. 25) which has not yet been fully briefed by the parties. Both parties desire to have the issue ruled upon before a final judgment is entered.

Accordingly, pursuant to Rule 60(a), Fed. R. Civ. P., the judgment entered on August 26, 1992 is hereby withdrawn, subject to reinstatement at the conclusion of the case.

IT IS SO ORDERED.

At Wichita, Kansas, this 27th day of October 1992.

/s/ Monti L. Belot
Monti L. Belot
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Kelly M. O'Gilvie
Plaintiff,
v.
United States of America
Defendant.

(Filed Nov. 30, 1993)
CIVIL ACTION
NO. 90-1075-MLB

MEMORANDUM AND ORDER

This case comes before the court on O'Gilvie's motion for summary judgment, pursuant to Fed. R. Civ. P. 56. (Doc. 41) In a previous opinion, this court held O'Gilvie's punitive damage award was excludable from income tax pursuant to § 104(a)(2) of the Internal Revenue Code. O'Gilvie's present motion seeks a ruling on whether the statutory interest paid on the award during the pendency of appeal is likewise excludable.

Some background on this case is necessary to an understanding of the motion. O'Gilvie's wife died of toxic shock syndrome. O'Gilvie brought a products liability action individually and on behalf of his deceased wife's estate to recover against Playtex. The jury awarded actual damages of $1.525 million and punitive damages of $10 million. The district court ordered the punitive damage award reduced to $1.35 million, effective from February 26, 1985. *O'Gilvie v. Intern. Playtex, Inc.*, 609 F. Supp. 817, 819 (D. Kan. 1985). The Tenth Circuit reversed the district court's order of remittitur and reinstated the $10 million punitive damage award. *O'Gilvie v. Intern. Playtex, Inc.*, 821 F.2d 1438, 1450 (10th Cir. 1987), *cert. denied*, 486 U.S.

1032 (1988). The Tenth Circuit made no comment with respect to interest on the amount of the judgment which it restored by its order. The district court entered judgment for O'Gilvie in accordance with the Tenth Circuit's mandate on June 10, 1988.

The government made an assessment on O'Gilvie's punitive damage award. O'Gilvie paid the tax, then commenced this action seeking a refund.

STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the moving party can demonstrate that there is no genuine issue of material fact and is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).

DISCUSSION

The issue before the court is whether the interest which accrued on the difference between $1.35 million and $10 million from the date of the district court's entry of remittitur on the punitive damage award to the district court's entry of judgment in accordance with the Tenth Circuit's mandate is taxable.[1] The government argues that

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[1] The government informs the court that Playtex paid O'Gilvie the full amount of the damage award ($11.525 million) with interest on the entire sum, including the amount restored by the Tenth Circuit's order. This appears to be confirmed by the language of the supersedeas bond filed January 15, 1988. O'Gilvie informs the court that the amount was calculated according to 28 U.S.C. § 1961(b) at the federal post-judgment rate.

statutory interest paid on an award of damages is separate and distinct from those damages and does not fall within the § 104(a)(2) exclusion. *Kovacs v. Commissioner*, 100 T.C. 124 (1993). O'Gilvie's argument is that because he had no legally enforceable claim to the remitted amount during the interim period before the $10 million award was reinstated and further because the Tenth Circuit's order was silent as to interest, the "additional amount" he ultimately received was really not interest on the remitted award. Rather, he contends that the "[additional]" . . . amount looks more like a larger personal injury award than the payment for the use of forbearance of money. (Doc. 42)

The court accepts that prior to the district court's entry of judgment reinstating the $10 million award, O'Gilvie had not realized any taxable income in the form of interest on the remitted amount. *See Helvering v. Horst*, 311 U.S. 112 (1940). This fact does not lead to the conclusion that the government was forever barred from assessing tax on the amount in question. O'Gilvie's argument elevates form over substance. The issue is not, as O'Gilvie suggests, whether a legally enforceable right to receive the remitted amount of punitive damages existed during the interim period between the entry of remittitur and reinstatement of the $10 million award. O'Gilvie improperly focuses upon *when* the punitive damage award was received instead of the fact that it was eventually realized. In the court's view, the issue is *whether* the "additional amount" received on the punitive damage award is interest and therefore "income" within the meaning of the Internal Revenue Code.

When it enacted the income tax, Congress intended " 'to use the full measure of its taxing power.' " *Commissioner v. Kowalski*, 434 U.S. 77, 82 (1977) (Citations omitted). The Internal Revenue Code broadly defines income to include all "accessions to wealth." 26 U.S.C. § 61(a);[2] *Lonsdale v. C.I.R.*, 661 F.2d 71, 72 (5th Cir. 1981). O'Gilvie's actual receipt of additional monies calculated at the statutory interest rate on the remitted amount falls within the scope of § 61(a), for it unquestionably constitutes an accession to wealth. The lapse of time before O'Gilvie actually received the "additional amount" on the remitted amount does not vitiate the status of the money as income.

O'Gilvie argues the statutory interest is excluded from tax under 26 U.S.C. § 104(a)(2), which provides in relevant part that "gross income does not include –

"(2) the amount of any damages received . . . on account of personal injuries. . . . "

Statutory exclusions to income must be specifically defined and are narrowly construed. *See St. Clair v. United States*, 778 F. Supp. 894, 895 (E.D.Va. 1991). O'Gilvie contends the reasoning of *United States v. Burke*, 119 L. Ed. 2d 34 (1992), indicates that where the source of the underlying claim is for personal injury, as it is in this case, any award "on account of" that personal injury is excludable from gross income. O'Gilvie argues the "additional amount" award falls within the exclusion.

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[2] Interest is merely one of fifteen listed examples of what constitutes income. The statute expressly recognizes that income is not limited to those fifteen items.

The government relies on *Kovacs v. Commissioner, supra,* and argues that § 104(a)(2) has no application to this case. In *Kovacs,* the taxpayers recovered damages in the amount of $995,000 in a wrongful death action. After exhausting its appeals, the defendant paid the taxpayers $2,254,741.70, the sum of the damages, and $1,253,607.17 in statutory interest. The taxpayers did not report any part of the amounts received on their 1987 federal income tax returns, and the government determined that the taxpayers should have included the interest portion of the award in gross income. The taxpayers filed a petition in Tax Court.

The taxpayers argued the term "damages" under § 104(a)(2) was broad enough to include interest on such damages. The court found a consistent line of authority had rejected the taxpayers' argument. It noted that Congress had reenacted the exclusion numerous times and continued to exclude only "damages" and omit any mention of "interest." The court found Congress' actions implied a continuing acceptance of the existing interpretation of the exclusion. Accordingly, the court held the statutory interest received by the taxpayers was not excludable under § 104(a)(2).

The court agrees with the Tax Court's analysis. *United States v. Burke* does not hold to the contrary. *Burke* does not address the treatment of statutory interest under § 104(a)(2). *Burke* decided whether payments received in settlement of a backpay claim under Title VII are excludable from gross income. The Court held they did not. 119 L. Ed. 2d at 47. *Burke* provides no support for O'Gilvie's position.

The court holds that the "additional amount" on $8.65 million from the date of the district court's entry of remittitur to the district court's entry of judgment in accordance with the Tenth Circuit's mandate was interest and is taxable as income.

IT IS SO ORDERED.

At Wichita, Kansas, this 30th day of November, 1993.

/s/ Monti L. Belot
Monti L. Belot
United States
District Judge

UNITED STATES DISTRICT COURT

_____ DISTRICT OF KANSAS

KELLY M. O'GILVIE

JUDGMENT IN A CIVIL CASE

v.

(Filed Nov. 30, 1993)

UNITED STATES OF AMERICA

CASE NUMBER: 90-1075-MLB

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order filed and docketed on the 30th day of November, 1993, the motion for summary judgment filed by the defendant, United States of America, is granted and the Court holds that the "additional amount" on $8.65 million from the date of the district court's entry of remittitur to the district court's entry of judgment in accordance with the Tenth Circuit's mandate was interest and is taxable as income.

November 30, 1993
Date

RALPH L. DeLOACH
Clerk

Entered on Docket
11/30/93

/s/ B. Hatchett
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

KELLY M. O'GILVIE

v.

UNITED STATES OF AMERICA

AMENDED JUDGMENT IN A CIVIL CASE

(Filed Dec. 7, 1993)

CASE NUMBER: 90-1075

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order filed and docketed on the 26th day of August, 1992, the motion for reconsideration filed by the plaintiff is granted and his motion for summary judgment is also granted; IT IS FURTHER ORDERED that pursuant to the Memorandum and Order filed and docketed on the 30th day of November, 1993, the motion for summary judgment filed by the defendant is granted and the Court holds that the "additional Amount" on $8.65 million from the date of the district court's entry of remittitur to the district court's entry of judgment in accordance with the Tenth Circuit's mandate was interest and is taxable as income.

December 7, 1993
Date

RALPH L. DeLOACH
Clerk

Entered on Docket 12/7/93

/s/ B. Hatchett
(By) Deputy Clerk

§ 104. Compensation for injuries or sickness

(a) **In general.** – Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include –

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;

(3) amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer);

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980; and

(5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a violent attack which the Secretary of State determines to be a terrorist attack and which occurred while such individual was an employee of the United States

engaged in the performance of his official duties outside the United States.

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c)(1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee. Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness.

Internal Revenue Code

SEC. 7806. CONSTRUCTION OF TITLE.

[Sec. 7806(a)]

(a) CROSS REFERENCES. – The cross references in this title to other portions of the title, or other provisions of law, where the word "see" is used, are made only for convenience, and shall be given no legal effect.

[Sec. 7806(b)]

(b) ARRANGEMENT AND CLASSIFICATION. – No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or

grouping of any particular section or provision or portion of this title, nor shall any table of contents, table of cross references, or similar outline, analysis, or descriptive matter relating to the contents of this title be given any legal effect. The preceding sentence also applies to the sidenotes and ancillary tables contained in the various prints of this Act before its enactment into law.

RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.

Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

(c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

(Amended March 19, 1948; Aug. 1, 1983; Aug. 1, 1985; Dec. 1, 1991; Dec. 1, 1993.)

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the

matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(Amended Mar. 19, 1948; July 1, 1966.)

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial

under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug 1, 1987.)

SUMMARY OF CASES

YEAR	CASE	COURT	NATURE OF UNDERLYING CLAIM	TYPE OF DAMAGES[1]	"UNDERLYING CLAIM" TEST	FINDING	COMPENSATORY PURPOSE TEST	FINDING	AMBIGUOUS/ PLAIN
1927	Hawkins 6 BTA 1023	B.T.A.	Libel and Slander 213(b)(6)	Damages	Not Mentioned		———		
1961	Agar 290 F.2d 283	2nd Cir.	Claim Severance Pay and Extra Compensation only	Severance Pay and Extra Compensation	Adopted p. 284	NO TORT CLAIM			
1962	Starrels 304 F.2d 577	5th Cir.	Consent to potential invasion of personal rights	Payment for Consent to Portray Father's Life	Adopted	NO TORT CLAIM	Dicta compensatory purpose		
1965	Knuckels 349 F.2d 610	10th Cir.	1) Contract Damages 2) Damages to Business	Lost Earnings, Business Losses; Contract Losses	Adopted	NO TORT CLAIM			
1972	Seay 58 TC 32	Tax Court	1) Wrongful discharge 2) Personal reputation	Damages in settlement for personal injury	Adopted p. 37	TORT CLAIM	Rejected pp. 37, 40		
1975	**Rev. Rule 75-45, 1975-1 C.B. 47**	**IRS**	Wrongful Death	Punitive Damages	Adopted	TORT CLAIM	Not Discussed		PLAIN
1975	Hodge 64 TC 616	Tax Court	Sexual Discrimination-Title VII	Back pay	Adopted	NO TORT CLAIM	———		
1981	Glynn 76 TC 116	Tax Court	Damaged personal reputation	Back pay Severance Pay	Adopted p. 119	NO TORT CLAIM	———		PLAIN p. 148
1981	Wolfson 651 F.2d 1228	6th Cir.	Libel	Lost Earnings, Damages to personal reputation	Adopted	TORT CLAIM	Not Discussed	———	———
1983	Church 80 TC 1104	Tax Court	Defamation	Punitive Damages	Adopted pp. 1110, 1106	TORT CLAIM	Rejected	———	———
1983	Roemer 716 F.2d 693	9th Cir.	Libel Defamation	Lost Income Punitive Damages	Adopted p. 700	TORT CLAIM	Rejected p. 699	———	———
1984	**Rev. Rule 84-108, 1984-2 C.B. 32**	**IRS**	Wrongful Death	Punitive Damages	Rejected	TORT CLAIM	Adopted	Punitive damages are not compensatory	No Analysis
1985	Rev. Rule 85-143, 1985-2, C.B. 55 (Rejected by Threlkeld)	IRS	Defamation	Loss of Professional Reputation	Rejected	TORT CLAIM	Adopted	———	No Analysis
1985	Burford 86-2 USTC ¶85,764	D.C. Ala.	Wrongful Death	Punitive Damages	Adopted p. 85,766	TORT CLAIM	Rejected p. 85,766	———	PLAIN p. 85,766
1986	Threlkeld 87 TC 76	Tax Court	1) Malicious Prosecution 2) Professional reputation	Damages for injury to professional reputation	Adopted p. 1308	TORT CLAIM	Rejected p. 1308	———	AMBIGUOUS p. 1308
1987	Bent 835 F.2d 67	3rd Cir.	1st Amendment Right to Free Speech	Lost Wages	Adopted p. 70	TORT CLAIM	Rejected p. 70	———	
1988	Threlkeld 848 F.2d 81 Rejects Rev. Rule 85-143	6th Cir.	1) Malicious Prosecution 2) Professional reputation	Business and Wage Losses Damages for injury to professional reputation	Adopted p. 84	TORT CLAIM	Rejected p. 84	———	Followed 3rd and 9th Cir. Rejected Rev. Rul. 85-143

[1] The excludability of these types of damages is contested by the IRS, other types of damages may have been awarded.

YEAR	CASE	COURT	NATURE OF UNDERLYING CLAIM	TYPE OF DAMAGES	"UNDERLYING CLAIM" TEST	FINDING	COMPENSATORY PURPOSE TEST	FINDING	AMBIGUOUS/PLAIN
1988	Metzger 88 TC 46	Tax Court	1) Breach of Contract 2) Discrimination	Lost Earnings	Adopted p. 847	TORT CLAIM	Rejected p. 847	_____	AMBIGUOUS TREAS. REG.
1988	Byrne 90 TC 1000	Tax Court	1) Fair Labor Standards Act 2) Wrongful Discharge	Allocation between tort and contract claim	Adopted		Rejected	_____	
1989	Wulf 883 F.2d 842	10th Cir.	Civil Rights Action	Front pay, Back pay, Lost benefits, Emotional Distress Damages, Punitive Damages	Adopted p. 873	TORT CLAIM	Rejected	_____	
1989	Thompson 866 F.2d 709	4th Cir.	1) Equal Pay Act 2) Contract Claim for Back pay	Back pay, Liquidated Damages	Adopted p. 711	TORT - Liquidated NO TORT-Contract	Rejected	_____	
1989	Byrne 883 F.2d 211	3rd Cir.	1) Fair Labor Standards Act 2) Wrongful Discharge	Allocation between tort and contract claim	Adopted p. 214	TORT CLAIM	Rejected p. 214	_____	
1989	Miller 93 TC 330	Tax Court	1) Defamation 2) Intentional infliction of emotional distress	Punitive Damages	Adopted	TORT CLAIM	Rejected	_____	PLAIN p. 338
1990	Rickel 900 F.2d 655	3rd Cir.	Age Discrimination	Lost Wages	Adopted p. 659	TORT CLAIM	Rejected p. 659	_____	
1990	Miller 914 F.2d 586 Reversing TC	4th Cir.	Defamation and libel	Punitive Damages	Rejected pp. 589, 591	TORT CLAIM	Adopted p. 591	Punitive damages are not compensatory	AMBIGUOUS
1990	Pistillo 912 F.2d 145	6th Cir.	Age Discrimination	Lost Wages	Adopted p. 148	TORT CLAIM	Rejected p. 148	_____	PLAIN
1991	Redfield 940 F.2d 542	9th Cir.	Age Discrimination	Economic Losses	Adopted p. 545	TORT CLAIM	Rejected	_____	
1991	Kemp 91-2 USTC ¶50,329	N.D. Ga.	Constitutional Rights Violation	Punitive Damages	Rejected p. 89,138	TORT CLAIM	Adopted p. 89,138	Punitive damages are not compensatory	AMBIGUOUS
1991	Downey 97 TC 10	Tax Court	Age Discrimination	Nonliquidated Damages Liquidated	Adopted pp. 4398-4399	TORT CLAIM	Rejected pp. 4398, 4399	_____	AMBIGUOUS
1991	Burke 929 F.2d 1119	6th Cir.	Sexual Discrimination-Title VII	Back pay	Adopted p. 1121	TORT CLAIM	Rejected p. 1121	_____	THRELKELD
1992	O'Gilvie 92-2 USTC ¶50,567	D.C. Kan.	Wrongful Death	Punitive Damages	Adopted	TORT CLAIM	Rejected	_____	FOLLOWED BURKE, U.S.
1992	**Burke 112 S.Ct. 1867**	**S.Ct.**	Sexual Discrimination-Title VII	Back pay	Adopted	NO TORT CLAIM	Rejected pp. 1869, 1872	_____	AMBIGUOUS p. 1870

YEAR	CASE	COURT	NATURE OF UNDERLYING CLAIM	TYPE OF DAMAGES	"UNDERLYING CLAIM" TEST	FINDING	COMPENSATORY PURPOSE TEST	FINDING	AMBIGUOUS/ PLAIN
1993	Hawkins 93-1 USTC ¶50,208	D.C. Ariz.	Breach of Good Faith, Fair Dealing	Punitive Damages	Adopted	TORT CLAIM	Rejected	_____	_____
1993	Horton 100 TC No. 8 Dec. 48,856	Tax Court	Physical Damage to Residence	Punitive Damages	Adopted p. 3967	TORT CLAIM	Rejected p. 3967	_____	PLAIN p. 3967
1993	Reese 94-1 USTC ¶50,232	Federal Claims	1) Sexual Discrimination 2) Sexual Harrassment	Punitive Damages	Rejected p. 50,448	TORT CLAIM	Adopted p. 50,448	Punitive damages are not compensatory	PLAIN
1993	Rice 834 F.Supp. 1241	E.D. Cal.	Age Discrimination	Liquidated Damages; Punitive Damages	Adopted	TORT CLAIM	Adopted	Liquidated and punitive damages not compensatory	No Analysis
1994	Hawkins 30 F.3d 1077	9th Cir.	Breach of Good Faith, Fair Dealing	Punitive Damages	Rejected	TORT CLAIM	Adopted	Punitive damages not compensatory	AMBIGUOUS
1994	Hawkins 30 F.3d 1077 J. Trott *Dissenting*	9th Cir.	Breach of Good Faith, Fair Dealing	Punitive Damages	Adopted	TORT CLAIM	Rejected	_____	PLAIN
1994	Horton 33 F.3d 625	6th Cir.	Physical Damage to Residence	Punitive Damages	Adopted p. 630	TORT CLAIM	Rejected p. 630	_____	PLAIN p. 631
1994	Wesson 94-1 USTC ¶50,139	D.C. Miss.	Insurance Fraud Claim	Punitive Damages	Adopted	NO TORT CLAIM	Adopted in dicta	_____	AMBIGUOUS
1994	McKay 102 TC 16	Tax Court	1) Wrongful Discharge 2) Breach of Contract	Wrongful discharge damages	Adopted p. 78,659	TORT CLAIM	Rejected p. 78,659	_____	
1994	Bennett 94-1 USTC ¶50,044	Federal Claims	Age Discrimination	Liquidated Damages Back pay	Adopted p. 83,177	TORT CLAIM	Dicta p. 83,179		
1994	Reese 24 F.3d 228	Fed. Cir.	1) Sexual Discrimination 2) Sexual Harrassment	Punitive Damages	Rejected p. 234		Adopted p. 231	Punitive damages are not compensatory	AMBIGUOUS, p. 230
199__	Robinson ____ TC ____	Tax Court	Wrongful failure to release lien	Punitive Damages	Adopted	TORT CLAIM	Rejected	_____	
1995	Wesson 48 F.3d 894	5th Cir	Insurance Fraud Claim	Punitive Damages	Adopted p. 897	TORT CLAIM	Adopted p. 898	Punitive damages not compensatory p. 900	AMBIGUOUS P. 897
1995	Schleier 95-1 USTC ¶50,309	S.Ct.	Age Discrimination	Liquidated damages	Adopted p. 88,117	NO TORT p. 88,117	Adopted p. 88,117	Liquidated damages are not compensatory	PLAIN p. 88,115-88,116
1995	O'Gilvie 95-2 USTC ¶50,508	10th Cir.	Wrongful Death	Punitive Damages		TORT CLAIM	Adopted	Punitive damages are not compensatory	AMBIGUOUS p. 89,639
1995	Robinson 1995 U.S. App. Lexis 33,759	5th Cir	Wrongful Failure to Release Lien	Punitive Damages	Rejected	TORT CLAIM	Adopted	Follows Wesson	AMBIGUOUS

STATUTORY AND REGULATORY PROVISIONS

Section 61(a) of the Internal Revenue Code of 1986, 26 U.S.C. §61(a), provides:

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived.

Revenue Act of 1918 Section 213(b)(6) provides:

> Amounts received through accident or health insurance or under workman's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness.

Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. §104(a), provides:

> (a) **In General**. Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include –
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness.

The 1989 Amendment to §104(a)(2) of the Internal Revenue Code, 26 U.S.C. §104(a) adds:

> Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness.

Section 1.104-1(c) of the Treasury Regulations, 26 C.F.R. §1.104-1(c), provides:

> Section 104(a)(2) [of the Internal Revenue Code] excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term "damages received" (whether by suit or agreement) means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution.

Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

No. 95-977

In the Supreme Court of the United States

OCTOBER TERM, 1995

KELLY M. O'GILVIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 514-2217

3 pp

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KELLY M. O'GILVIE, PETITIONER

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

1. This petition is from the same judgment that is the subject of the petition for a writ of certiorari in *O'Gilvie* v. *United States*, No. 95-966. For the reasons stated in the brief in opposition to the petition for a writ of certiorari in No. 95-966, this petition should also be denied.*

2. Petitioner contends (Pet. 28-30) that the notice of appeal filed by the government was untimely. Petitioner asserts that an order of the district court dated November 30, 1993, accompanied by the Clerk's notation of judgment on that date, constituted the final

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* We are providing a copy of the brief in opposition filed in No. 95-966 to petitioner.

judgment in this case. Petitioner argues that the notice of appeal was untimely because it was filed more than 60 days after that date (Pet. App. 5-6).

As both the district court and the court of appeals noted, however, the November 30 order and judgment did not resolve all of the issues presented in this case (Pet. App. 5-8 & n.5). The November 30 order therefore remained interlocutory until a final judgment was entered disposing of all of the issues in the case on December 7, 1993. The time for filing a notice of appeal thus did not begin to run until December 7, 1993 (*id.* at 8). The notice of appeal was filed by the government within 60 days of that date and was therefore timely (*ibid.*). There is no conflict among the circuits or other reason warranting further review of this fact-specific application of established law.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1996

(4) (3)

Nos. 95-966, 95-977

Supreme Court, U.S.
FILED
MAY 7 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE, minors,

Petitioners,

-and-

KELLY M. O'GILVIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

LINDA D. KING
Counsel of Record
Attorney for Petitioner
Kelly M. O'Gilvie
6135 East Central
Wichita, Kansas 67208
(316) 686-2000

ROBERT M. HUGHES
Counsel of Record
JACK D. FLESHER
GREGORY L. FRANKEN
DAVID B. SUTTON
BEVER, DYE, MUSTARD
& BELIN, L.C.
Attorneys for Petitioners
Kevin M. O'Gilvie and
Stephanie L. O'Gilvie, minors
106 West Douglas, Suite 700
Wichita, Kansas 67202
(316) 263-8294

PETITION FOR CERTIORARI OF KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE, MINORS FILED DECEMBER 19, 1995

PETITION FOR CERTIORARI OF KELLY M. O'GILVIE FILED DECEMBER 21, 1995

CERTIORARI GRANTED, AND PETITIONS CONSOLIDATED, MARCH 25, 1996

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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Appendix R — Letter from Joint Committee to Honorable Fred T. Goldberg, Commissioner of Internal Revenue Dated May 3, 1990	76a
Appendix S — Letter from IRS to Kevin O'Gilvie Allowing Refund Dated June 6, 1990	78a
Appendix T — Copy of Refund Checks	79a
Appendix U — Supersedeas Bond Filed January 15, 1988	81a

The following opinions, judgments, memoranda and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix of one or both of the printed Petitions for Certiorari:

Opinion of the Court of Appeals for the Tenth Circuit dated September 19, 1995:

Petition of Kelly M. O'Gilvie A1

Petition of Kevin M. O'Gilvie and Stephanie L. O'Gilvie 1a

Judgment of the Court of Appeals for the Tenth Circuit dated October 18, 1995:

Petition of Kevin M. O'Gilvie and Stephanie L. O'Gilvie 23a

Judgment of the District Court of Kansas Dated May 26, 1992:

Petition of Kelly M. O'Gilvie A25

Petition of Kevin M. O'Gilvie and Stephanie L. O'Gilvie 26a

Memorandum and Order of the District Court of Kansas dated August 26, 1992:

Petition of Kelly M. O'Gilvie A26

Petition of Kevin M. O'Gilvie and Stephanie L. O'Gilvie 25a

Judgment of the District Court of Kansas dated August 26, 1992:

Petition of Kelly M. O'Gilvie A29

Order of the District Court of Kansas dated August 27, 1992:

Petition of Kelly M. O'Gilvie A30

Memorandum and Order of the District Court of Kansas dated November 30, 1993:

Petition of Kelly M. O'Gilvie A31

Judgment of the District Court of Kansas dated November 30, 1993:

Petition of Kelly M. O'Gilvie A37

Amended Judgment of the District Court of Kansas dated December 7, 1993:

Petition of Kelly M. O'Gilvie A38

APPENDIX A — DOCKET ENTRIES

DOCKET ENTRIES FOR KELLY O'GILVIE

U.S. District Court
U.S. District Court for the District of Kansas (Wichita)

CIVIL DOCKET FOR CASE #: 90-CV-1075

Filed: 02/13/90

Nature of Suit: 870
Jurisdiction: US Defendant

O'Gilvie v. USA
Assigned to: Judge Monti L. Belot
Demand: $695,000
Lead Docket: None
Dkt # in 10CCA: is: 94- -03031
Dkt # in 10CCA: is: 94- -03004

Cause: 26:7422 IRS: Refund Taxes

KELLY M. O'GILVIE
plaintiff

Linda D. King
[COR LD NTC]
6135 East Central
P.O. Box 8085
Wichita, KS 67208
316-686-2000
FTS 686-1818

Appendix A

John C. King
[term 08/02/93]
[COR LD NTC]
Law Office of John C. King, Ltd.
260 North Rock Road — Ste. 128
P.O. Box 782106
Wichita, KS 67278
316-682-3000

v.

UNITED STATES OF AMERICA
defendant

Noreene C Stehlik
202-514-6489
[COR LD NTC]
Office of Special Litigation
Tax Division
U.S. Department of Justice
P.O. Box 7238 - Ben Franklin Station
Washington, DC 20044

2/13/90	1	COMPLAINT; Summons(es) issued (case referred to Magistrate John T. Reid) (ckr) [Entry date 09/25/90]
2/13/90	—	SUMMONS issued (ckr) [Entry date 09/25/90]
2/13/90	—	FILING FEE PAID: on 2/13/90 in the amount of $120.00, receipt #78332. (ckr) [Entry date 09/25/90]

Appendix A

2/21/90	2	RETURN OF SERVICE executed upon defendant USA on 2/21/90 (ckr) [Entry date 09/25/90]
4/23/90	3	ANSWER by defendant, re: [1-1] (ckr) [Entry date 09/25/90]
9/27/90	4	MOTION by defendant for Scheduling Order cc: Mag Reid (ckr)
10/1/90	5	SCHEDULING ORDER ENTERED: Magistrate John T. Reid; Pretrial Conference set for 2:00 pm on 3/29/91; Discovery ddl set for 2/1/91; Dispositive Mtn ddl 3/15/91 (cc: all counsel) (jb) [Entry date 10/02/90]
12/18/90	6	Proposed WITNESS LIST submitted by defendant (ckr)
12/19/90	7	PROPOSED WITNESS & EXHIBIT LIST submitted by plaintiff (ckr) [Entry date 12/20/90]
2/1/91	8	MOTION by plaintiff to amend pleadings, cc: Magistrate Reid (ckr) [Entry date 02/04/91]
2/28/91	9	ORDER ENTERED: by Magistrate John T. Reid granting motion to amend pleadings [8-1] (cc: all counsel) (ckr)
3/1/91	10	MOTION by plaintiff to extend dispositive motion deadlines, cc: Magistrate Reid w/Order (ckr) [Entry date 03/04/91]

Appendix A

3/11/91	11	MOTION by defendant to continue Pretrial Conference, cc: Magistrate Reid w/Order (ckr) [Entry date 03/12/91]
3/13/91	12	ORDER ENTERED: by Magistrate John T. Reid granting motion to extend dispositive motion deadlines [10-1] and granting motion to continue Pretrial Conference [11-1]; Dispositive MTN ddl 4/15/91; Plaintiff shall file amendment on or before 3/15/91 or within 10 days of receipt of such disallowance to include additional overpayment; Pretrial conference continued to 4/29/91 at 2 p.m. (cc: all counsel) (ckr) [Entry date 03/14/91]
4/12/91	13	MOTION by USA for summary judgment, referred to Judge Monti L. Belot (ckr) [Edit date 04/22/92]
4/12/91	14	CERTIFICATE of service of motion for summary judgment by defendant (ckr)
4/15/91	15	MOTION by plaintiff for summary judgment referred to Judge Monti L. Belot (ckr) [Entry date 04/16/91] [Edit date 04/22/92]
4/16/91	16	MEMORANDUM in support by plaintiff of motion for summary judgment referred to Judge Sam A. Crow [15-1] (ckr)
5/6/91	18	MEMORANDUM in opposition by plaintiff re: Defendant's Cross-motion for summary judgment, referred to Judge Sam A. Crow [13-1] (lkl) [Entry date 05/07/91]

Appendix A

5/7/91	17	RESPONSE by defendant to Plaintiff's motion for summary judgment referred to Judge Sam A. Crow [15-1] (lkl)
5/14/91	19	UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF re: motion for summary judgment, referred to Judge Sam A. Crow [13-1] cc: Judge Crow (lkl)
5/16/91	20	REPLY MEMORANDUM by plaintiff re: motion response [17-1] to his motion for summary judgment cc: Judge Crow (lkl) [Entry date 05/17/91]
5/22/91	21	PRE-TRIAL ORDER ENTERED by Judge Sam A. Crow: Terminating case referral of Magistrate Judge John T. Reid discovery is complete & case is ready for trial trial in Wichita to court ETT: 1 days. Prospects for settlement are poor. 6 pages (cc: all counsel) (lkl)
8/22/91	22	AMENDED COMPLAINT [1-1] — by plaintiff (lkl) [Entry date 08/23/91]
9/10/91	23	ANSWER — by defendant to amended complaint [22-1] (lkl)
1/15/92	24	MINUTE ORDER — ENTERED: by Clerk Case reassigned to Judge Monti L. Belot (cc: all counsel) (bt) [Entry date 01/16/92]
4/23/92	25	AMENDED FINAL PRETRIAL CONFERENCE ORDER ENTERED: by Judge

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Monti L. Belot re [21-1] due to plaintiff amending his complaint. If a trial is required, the case will be tried at Wichita to the Court. Estimated trail time is 1 day with prospects for settlement poor. (cc: all counsel) (vlw) [Entry date 04/24/92]

5/26/92 26 MEMORANDUM AND ORDER: by Judge Monti L. Belot granting motion for summary judgment filed by the defendant [13-1] terminating case 10 pages (cc: all counsel) (bt)

5/26/92 27 JUDGMENT IN A CIVIL CASE ENTERED: Judgment is granted deft in granting their motion for s/j (cc: all counsel) (bt)

6/5/92 28 MOTION by plaintiff Kelly M O'Gilvie for reconsideration referred to Judge Monti L. Belot (vlw)

6/5/92 29 MEMORANDUM/BRIEF in support by plaintiff Kelly M O'Gilvie re: motion for reconsideration referred to Judge Monti L. Belot [28-1] (vlw)

6/23/92 30 MOTION by defendant USA to extend time until 7/6/92 to file its opposition to pltf's motion for reconsideration of judgment referred to Judge Monti L. Belot (vlw) [Entry date 06/24/92]

06/26/92 31 ORDER ENTERED: by Senior Judge Frank G. Theis granting aft's motion to extend time until

		7/6/92 to file its opposition to pltf's motion for reconsideration of judgment [30-1] (cc: all counsel) (vlw)
7/6/92	32	RESPONSE in OPPOSITION and MEMORANDUM IN SUPPORT OF OPPOSITION by defendant USA to pltf's motion for reconsideration referred to Judge Monti L. Belot [28-1] (vlw) [Entry date 07/07/92]
8/26/92	33	MEMORANDUM AND ORDER: by Judge Monti L. Belot granting pltf's motion for reconsideration [28-1] and sustaining pltf's motion for summary judgment [15-1] 3 pages (cc: all counsel) (vlw)
8/26/92	34	JUDGMENT ENTERED by the Clerk: pursuant to the Memorandum and Order filed and entered on the docket on 8/26/92 [33-1] granting the plaintiff's motion for reconsideration (Dkt. 28) and sustaining plaintiff O'Gilvie's motion for summary judgment (Dkt. 15) (cc: all counsel) (vlw)
10/26/92	35	NOTICE OF APPEAL by defendant USA from Dist. Court decision re: [33-1] (cc: all counsel, 10CCA: (adw) [Entry date 10/27/92]
10/26/92	—	APPEAL FEE STATUS: $105.00 appeal filing fee waived, U.S. Appellant (adw) [Entry date 10/27/92]

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10/27/92	36	ORDER ENTERED: by Judge Monti L. Belot vacating [34-1] judgment (cc: all counsel) (bt)
10/30/92	37	NOTICE by defendant USA of withdrawl of appeal (cc: USCA) (adw) [Entry date 11/02/92]
11/2/92	38	LETTER to 10CCA stating notice of withdrawl of appeal filed 10/30/92, counsel advised notice should also be filed with USCA re: (adw)
11/3/92	39	RECEIPT FROM USCA of preliminary record rec'd 11/3/92 re: appeal [35-1] (adw)
11/3/92	40	APPEAL DOCKETED in 10th Circuit on 10/30/92 and assigned Dkt No. 92-3403 (adw)
11/10/92	42	MEMORANDUM/BRIEF in support by plaintiff re: motion for summary judgment referred to Judge Monti L. Belot [41-1] (bt) [Entry date 11/12/92]
11/11/92	41	MOTION by plaintiff for summary judgment referred to Judge Monti L. Belot (bt) [Entry date 11/12/92]
11/16/92	43	MANDATE, 10CCA: dismissing the appeal on appellant's motion to dismiss [35-1] (cc: all counsel) (adw)
11/30/92	44	MOTION by defendant USA for summary judgment referred to Judge Monti L. Belot (ckr)
3/29/93	45	MEMORANDUM/BRIEF in support by

		defendant USA re: motion for summary judgment referred to Judge Monti L. Belot [44-1] (bt)
5/18/93	46	MOTION by plaintiff Kelly M O'Gilvie for leave to file reply out of time referred to Judge Monti L. Belot (bt)
5/18/93	47	SUPPLEMENT by plaintiff Kelly M O'Gilvie re: motion for summary judgment referred to Judge Monti L. Belot [41-1] (bt)
5/19/93	48	REPLY by plaintiff Kelly M O'Gilvie to response to motion for summary judgment referred to Judge Monti L. Belot [41-1] (bt)
5/19/93	49	MEMORANDUM/BRIEF in support by plaintiff Kelly M O'Gilvie re: motion reply [48-1] (bt)
5/27/93	50	MOTION by plaintiff Kelly M O'Gilvie to certify discharge of attorney referred to Judge Monti L. Belot (bt)
6/3/93	51	NOTICE of hearing; In-court hearing on motion to certify discharge of atty set for 6/14/93 at 1:30 pm (cc: all counsel) (bt) [Entry date 06/04/93]
6/22/93	52	MOTION by counsel King for plaintiff Kelly M O'Gilvie to withdraw attorney referred to Judge Monti L. Belot (bt) [Entry date 06/23/93]

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6/22/93	53	NOTICE by counsel John King for plaintiff Kelly M O'Gilvie of attorney's lien (bt) [Entry date 06/23/93]
7/2/93	54	ACCEPTANCE/ACKNOWLEDGMENT OF SERVICE by defendant USA on 6/23/93 (bt)
7/7/93	55	RESPONSE by defendant USA to motion to withdraw attorney referred to Judge Monti L. Belot [52-1] (bt) [Entry date 07/09/93]
7/7/93	56	CERTIFICATE of service of response to motion to withdraw by defendant USA (bt) [Entry date 07/09/93]
7/19/93	57	MEMORANDUM/BRIEF in support by plaintiff Kelly M O'Gilvie re: notice [53-1] (bt) [Entry date 07/20/93]
7/20/93	58	NOTICE of hearing; In-court hearing on motion to withdraw set for 8/2/93 at 10:00 am before Judge Belot (cc: all counsel) (bt)
7/20/93	59	ORDER ENTERED: by Judge Monti L. Belot granting pltf's motion for leave to file reply out of time [46-1] (cc: all counsel) (bt)
8/2/93	60	MINUTE SHEET: Wichita — granting motion to certify discharge of attorney [50-1] granting motion to withdraw attorney [52-1] attorney John C. King for Kelly M O'Gilvie (bt) [Entry date 08/03/93]

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10/6/93	61	ORDER ENTERED: by Judge Monti L. Belot withdrawing attorney John King as counsel for pltf effective 8/2/93 (cc: all counsel) (bt)
11/30/93	62	MEMORANDUM AND ORDER: by Judge Monti L. Belot granting deft's motion for summary judgment and holding that the "addl amt" on $8.65 million from the date of the court's entry of remittitur to the court's entry of judgment in accordance with the Tenth Circuit's mandate was interest and is taxable as income [44-1] terminating case 6 pages (cc: all counsel) (bt)
11/30/93	63	JUDGMENT IN A CIVIL CASE ENTERED by Clerk granting the motion for s/j filed by the defendant (cc: all counsel) (bt)
12/7/93	64	AMENDED JUDGMENT ENTERED by Clerk amending judgment entered to reflect previous order (cc: all counsel) (bt)
1/5/94	65	NOTICE OF APPEAL by plaintiff Kelly M O'Gilvie from Dist. Court decision re: (cc: all counsel, 10CCA: (adw) [Entry date 01/06/94]
1/5/94	—	APPEAL FEE STATUS: $105.00 appeal filing fee paid Receipt # 6498 (adw) [Entry date 01/06/94]
1/14/94	66	RECEIPT FROM USCA of preliminary record rec'd 1/12/94 re: appeal [65-1] (adw) [Entry date 01/18/94]

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1/14/94	67	APPEAL DOCKETED in 10th Circuit on 1/12/94 and assigned Dkt No. 94-3004 (adw) [Entry date 01/18/94]
1/19/94	68	TRANSCRIPT ORDER FORM of appellant re [65-1] transcript not necessary for this appeal; (adw)
1/19/94	69	LETTER to 10CCA stating record is complete for purpose of appeal (cc: counsel) (adw)
2/1/94	70	NOTICE OF CROSS-APPEAL by defendant USA from Dist. Court decision re: [64-1] (cc: all counsel, 10CCA: (adw) [Entry date 02/02/94]
2/1/94	—	APPEAL FEE STATUS: $105.00 appeal filing fee not paid, US appeal (adw) [Entry date 02/02/94]
2/1/94	—	APPEAL FEE STATUS: $105.00 appeal filing fee re: [70-1] re appeal [70-1] paid Receipt # 6498 (dw) [Entry date 01/24/95]
2/16/94	71	RECEIPT FROM USCA of preliminary record rec'd 2/11/94 re: [70-1] (adw) [Entry date 02/18/94]
2/16/94	72	APPEAL DOCKETED in 10th Circuit on 2/11/94 re: [70-1] and assigned Dkt No. 94-3031 (adw) [Entry date 02/18/94]
3/2/94	73	LETTER from 10CCA stating possible jurisdictional defect in appeals re: [70-1], re: [65-1] (adw) [Entry date 03/03/94]

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1/29/96	74	LETTER from USCA regarding Writ of Certiorari filed 12-21-95 and assigned Supreme Court No. 95-977. [70-1] & [65-1] (bs) [Entry date 01/30/96]
4/4/96	75	Letter from 10CCA stating writ of certiorari was granted by order on 3-25-96. [70-1] [65-1] (bs) [Entry date 04/06/96]

Appendix A

DOCKET ENTRIES FOR KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE

REOPEN REFER

U.S. District Court
U.S. District Court for the District of Kansas (Wichita)

CIVIL DOCKET FOR CASE #: 92-CV-1358

Filed: 07/09/92

Nature of Suit: 870
Jurisdiction: US Plaintiff

USA v. O'Gilvie, et al
Assigned to: Judge Monti L. Belot
Demand: $784,000
Lead Docket: None
Dkt # in 10CCA: is: 94 - - 03058

Cause: 26: 7422 IRS: Refund Taxes

UNITED STATES OF AMERICA
plaintiff

Noreene C Stehlik
202-514-6489
[COR LD NTC]
Office of Special Litigation
Tax Division
U.S. Department of Justice
P.O. Box 7238 — Ben Franklin
Station
Washington, DC 20044

Appendix A

Rachel D Cramer
[COR LD NTC]
U.S. Department of Justice
Office of Special Litigation —
Tax Div.
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044

v.

KEVIN M O'GILVIE
defendant

Linda D. King
[COR LD NTC]
6135 East Central
P.O. Box 8085
Wichita, KS 67208
316-686-2000
FTS 686-1818

John C. King
[term 07/30/93]
[COR LD NTC]
Law Office of John C. King,
Ltd.
260 North Rock Road — Ste. 128
P.O. Box 782106
Wichita, KS 67278

Appendix A

STEPHANIE L O'GILVIE
defendant

Linda D. King
(See above)
[COR LD NTC]

John C. King
[term 07/30/93]
(See above)
[COR LD NTC]

7/9/92	1	COMPLAINT w/designation of place of trial — Wichita; Summons(es) issued (bt)
7/9/92	—	FILING FEE waived — US Government (bt)
8/26/92	2	RETURN OF SERVICE executed on 8/25/92 on conservator of the estate (bt) [Entry date 08/27/92]
8/26/92	3	RETURN OF SERVICE executed on 8/25/92 to Ralph Pitts (bt) [Entry date 08/27/92]
8/26/92	4	RETURN OF SERVICE executed upon defendant Stephanie L O'Gilvie on 8/26/92 (bt) [Entry date 08/27/92]
8/26/92	5	RETURN OF SERVICE executed upon defendant Kevin M O'Gilvie on 8/26/92 (bt) [Entry date 08/27/92]

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9/10/92	6	ATTORNEY APPEARANCE for defendant Stephanie L O'Gilvie by John C. King (bt)
9/10/92	7	ATTORNEY APPEARANCE for defendant Kevin M O'Gilvie by John C. King (bt)
10/16/92	8	ATTORNEY APPEARANCE for defendant Kevin M O'Gilvie by Linda D. King (bt) [Entry date 10/19/92]
10/16/92	9	ATTORNEY APPEARANCE for defendant Stephanie L O'Gilvie by Linda D. King (bt) [Entry date 10/19/92]
2/19/93	10	MOTION by defendants to dismiss and or in the alternative to quash service of summons referred to Chief Judge Patrick F. Kelly (bs)
2/19/93	11	MEMORANDUM in support of motion by defendants to dismiss [10-1] or in the alternative to quash service of summons referred to Chief Judge Patrick F. Kelly [10-2] (bs)
3/16/93	12	OBJECTIONS by plaintiff USA to motion by defendants to dismiss referred to Chief Judge Kelly [10-1] (bs)
3/29/93	13	REPLY by defendants to response by USA to motion by defendants to dismiss referred to Chief Judge Kelly [10-1] (bs) [Entry date 03/30/93]

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3/30/93	—	AMENDED REPLY by defendants to the response of USA to Motion to Dismiss [13-1] (bs) [Entry date 03/31/93]
3/30/93	14	AMENDED REPLY by Defendants to response by USA to motion by defendants to dismiss. (original reply missing two pages no other changes have been made) referred to Chief Judge Kelly. [10-1] (bs) [Entry date 03/31/93]
6/25/93	15	MEMORANDUM AND ORDER by Chief Judge Patrick F. Kelly: denying motion by defendants to dismiss [10-1] based on unsatisfactory service of process [10-2] 5 pages (cc: all counsel) (ckr) [Entry date 06/28/93]
7/19/93	16	MEMORANDUM ORDER: by Chief Judge Patrick F. Kelly Case reassigned to Judge Monti L. Belot (cc: all counsel) (bs)
7/21/93	17	MOTION by defendants for extension of time to file answer referred to Chief Judge Patrick F. Kelly (bs) [Entry date 07/22/93]
7/21/93	18	MOTION by John King, attorney for Defts to withdraw attorney referred to Judge Monti L. Belot (bs) [Entry date 07/22/93]
7/22/93	19	ORDER ENTERED: by Judge Monti L. Belot granting motion by defendants for extension of time to file answer within 10 days of the entry of this order [17-1] (cc: all counsel) (bs)

7/26/93	20	RESPONSE by plaintiff USA to motion by John King, attorney for Defts to withdraw attorney referred to Judge Monti L. Belot [18-1] (bs)
7/30/93	21	ORDER ENTERED: by Judge Monti L. Belot granting motion by John King, attorney for Defts to withdraw as counsel [18-1] (cc: all counsel) (bs)
8/20/93	22	STIPULATION and ORDER ENTERED: by Judge Monti L. Belot, counsel for defendants and counsel for US. (cc: all counsel) (bs) [Entry date 08/23/93]
9/10/93	23	MOTION by defendants to extend time to answer referred to Judge Monti L. Belot w/order. (bs)
9/10/93	24	ANSWER by defendants to complaint [1-1] (bs)
9/14/93	25	ORDER ENTERED: by Judge Monti L. Belot granting motion by defendants to extend time to answer within five days of the entry of this order [23-1] (cc: all counsel) (bs)
2/2/94	26	JUDGMENT WITHDRAWN (ckr) [Edit date 02/04/94]
2/4/94	27	MINUTE ORDER — ENTERED by Clerk: withdrawing judgment from the file [26] (cc: all counsel) (ckr)

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2/22/94	28	ORDER ENTERED: by Judge Monti L. Belot that the pltf will take nothing on its complaint against defts and the action is dismissed on the merits (cc: all counsel) (bt)
3/4/94	29	NOTICE OF APPEAL by plaintiff USA from Dist. Court decision re: [28-1] (cc: all counsel, 10CCA: (adw)
3/4/94	—	APPEAL FEE STATUS: $105.00 appeal filing fee waived, US Appeal (adw)
3/15/94	30	RECEIPT FROM USCA of preliminary record rec'd 3/7/94 re: [29-1] (mjm) [Edit date 03/15/94]
3/15/94	31	APPEAL DOCKETED in 10th Circuit on March 10, 1994 re: [29-1] and assigned Dkt No. 94-3058 (mjm)
3/15/94	32	TRANSCRIPT ORDER FORM of appellant re [29-1] A transcript is not necessary for this appeal filed by plaintiff (mjm)
3/16/94	33	LETTER to 10th Circuit Court of Appeals stating record is complete for purpose re: [29-1] (mjm)
10/18/95	34	MANDATE, 10CCA: reversing and remanding the Decision of the District Court for further proceedings in accordance with the opinion of this court re: [29-1] (cc: Judge Belot) (adw)

Appendix A

10/24/95	35	Statement of costs by USCA for plaintiff USA in the amount of $116.56 (cc: all counsel) (adw) [Entry date 10/25/95]
1/29/96	36	LETTER from USCA regarding Writ of Certiorari filed 12-29-95 and assigned Supreme Court No. 95-966. (bs) [Entry date 01/30/96]
4/4/96	37	Letter from 10CCA stating writ of certiorari was granted by an order on 3-25-96. (bs) [Entry date 04/06/96]

APPENDIX B — COMPLAINT FILED FEBRUARY 13, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 90-1075-C

KELLY M. O'GILVIE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

COMES NOW the Plaintiff, Kelly M. O'Gilvie, one of three intestate heirs of the Estate of Betty O'Gilvie, by and through his attorneys, John C. King and Linda D. King and states:

Jurisdiction and Venue

1. This action is instituted pursuant to, and jurisdiction arises under, 28 U.S.C. 1346(a)(1) and 26 U.S.C. 6532(a)(1) and 7422(a), for the recovery of income tax and interest erroneously, illegally, wrongfully or excessively assessed and collected from Plaintiff.

2. Plaintiff, Kelly M. O'Gilvie, is an individual residing in Benton, Kansas and within the District of Kansas. Plaintiff's late wife, Betty O'Gilvie, resided in Sedgwick County, Kansas at the

time of her death. Betty O'Gilvie's estate was administered in the District Court, Probate Department, Sedgwick County, Kansas.

3. Defendant, United States of America, may be sued within this district pursuant to 28 U.S.C. 1391(e).

4. On 2 April 1983, Plaintiff's wife, Betty O'Gilvie, died as a result of toxic shock syndrome. Kelly O'Gilvie in his individual capacity, as the natural guardian of Kevin and Stephanie O'Gilvie, their children, and as the administrator of the Estate of Betty O'Gilvie, sued Playtex International, Inc. in the United States District Court for the District of Kansas for wrongful death and for his late wife's conscious pain and suffering. The case was tried to a jury.

5. The jury returned a verdict for pecuniary and nonpecuniary damages, which amounts were excluded from the income of the recipients by virtue of IRC 104(a)(2). The jury also awarded damages for conscious pain and suffering in the amount of two hundred thousand dollars ($200,000.00) and punitive damages to the Estate of Betty O'Gilvie in the amount of ten million dollars ($10,000,000.00). Judgment was entered on the verdict and affirmed on appeal.

6. On 13 June 1989, Plaintiff, Kelly M. O'Gilvie, as administrator of the Estate of Betty O'Gilvie, caused the estate's 1988 income tax return Form 1041 to be filed with the Internal Revenue Service at Austin, Texas. This Form 1041 included $4,967,292.00 as gross income representing the punitive damage award, net of attorney's fees and case expenses received in 1988 from Playtex International, Inc.

7. On 4 August 1989, Plaintiff, Kelly M. O'Gilvie, in his

individual capacity as an intestate heir of the Estate of Betty O'Gilvie included in his gross income the amount of $2,483,646.00 as his intestate share of such punitive damage award. IRC 662(b).

8. When it was determined that the punitive damage award was either not gross income or was excludable form gross income under 26 U.S.C. 104(a)(2), Plaintiff, Kelly M. O'Gilvie, as administrator of the Estate of Betty O'Gilvie and in his individual capacity as an intestate heir of the Estate of Betty O'Gilvie, on filed on 9 August 1989 an amended Form 1041 for the Estate of Betty O'Gilvie and a Form 1040X for himself reporting thereon a net decrease in gross income in the amounts of $4,967,292.00 and $2,283,646.00, respectively. The decrease in gross income results in the overpayment of income tax by Kelly M. O'Gilvie in his individual capacity of $695,415.00. Kelly M. O'Gilvie, in his individual capacity, requests a refund in that amount plus interest.

9. More than six (6) months have elapsed since the filing of the amended Form 1041 and the Form 1040X and the Secretary of the Treasury has not rendered a decision thereon. Plaintiff is therefore entitled to bring this action. 26 U.S.C. 6532(a).

10. Plaintiff, Kelly M. O'Gilvie, has overpaid his federal income tax in the amount of $695,415.00 which amount, together with interest as provided by law on overpayments, is due and owing to Plaintiff from Defendant.

11. Plaintiff, Kelly M. O'Gilvie, administrator of the Estate of Betty O'Gilvie, elected under IRC 661(a)(2) and 662(a)(2)(B) to consider the payments from the Estate of Betty O'Gilvie as payments to the intestate heirs of the items directly. Accordingly,

the Estate of Betty O'Gilvie deducted on its Form 1041 the amounts which it paid to the intestate heirs. The Estate of Betty O'Gilvie showed no tax on its original Form 1041 or on its amended Form 1041.

12. Attached hereto is a copy of Plaintiff's 1988 Form 1040X.

13. The action of Defendant, through the Secretary of the Treasury, in refusing to refund income tax overpaid by Plaintiff was erroneous, illegal, wrongful or excessive.

14. No assignment or transfer has been made regarding any part of Plaintiff's claim.

WHEREFORE, Plaintiff prays that judgment be entered in his favor in the amount of $695,415.00, together with interest as provided by law on the overpayment and the costs of this action.

s/ John C. King
John C. King #13827

s/ Linda D. King
Linda D. King #13004
King & King, P.A.
6135 East Central
P.O. Box 8085
Wichita, Kansas 67208
(316) 686-2000

Appendix B

John C. King is
Of Counsel to
Martin, Pringle, Oliver,
Wallace & Swartz
300 Page Court
220 W. Douglas
Wichita, Kansas 67202-3194
(316) 265-9311

Form **1040X** (Rev. October 1988)

Department of the Treasury – Internal Revenue Service

Amended U.S. Individual Income Tax Return

OMB No. 1545-0091
Expires 9-30-90

This return is for calendar year ▶ 1988 , OR fiscal year ended ▶ , 19 .

PRINT OR TYPE

Your first name and initial (if joint return, also give spouse's name and initial) Last name
Kelly M. O'Gilvie

Your social security number
514-70-2944

Present home address (number, street, apt. no. or rural route) (If you have a P.O. Box, see instructions)
c\o John C. King P.O. Box 8085

Spouse's social security number
Unknown

City, town or post office, state, and ZIP code
Wichita, KS 67208-0085

Telephone number (optional)
316-686-2000

Taxpayer Service Group RECEIVED AUG 11 1989 I.R.S. Wichita, Kansas

Enter below name and address as shown on original return (if same as above, write "Same"). If changing from separate to joint return, enter names and addresses used on original returns. (Note: You cannot change from joint to separate returns after the due date has passed.)

SAME

A Service center where original return was filed
Austin, Texas

B Has original return been changed or audited by IRS? ..... ☐ Yes ☒ No
If "No," have you been notified that it will be? ..... ☐ Yes ☒ No
If "Yes," identify IRS office ▶

C Are you amending your return to include any item (loss, credit, deductions, other tax benefit, or income) relating to a tax shelter required to be registered? ..... ☐ Yes ☒ No
If "Yes," you MUST attach Form 8271 Investor Reporting of Tax Shelter Registration Number.

D Filing status claimed. (Note: You cannot change from joint to separate returns after the due date has passed.)
On original return .. ▶ ☐ Single ☐ Married filing joint return ☒ Married filing separate return ☐ Head of Household ☐ Qualifying widow(er)
On this return ..... ▶ ☐ Single ☐ Married filing joint return ☒ Married filing separate return ☐ Head of Household ☐ Qualifying widow(er)

Income and Deductions (see instructions)		A. As originally reported or as adjusted (see instructions)	B. Net change—increase or (decrease)—explain on page 2	C. Correct amount
1 Total income	1	3426018	-2483646	942372
2 Adjustments to income	2			
3 Adjusted gross income (subtract line 2 from line 1)	3	3426018	-2483646	942372
4 Deductions	4	2500		2500
5 Subtract line 4 from line 3	5	3423518	-2483646	939872
6 Exemptions	6	5850		5850
7 Taxable income (subtract line 6 from line 5)	7	3417668	-2483646	934022
8 Tax (see instructions). (Method used in col. C TAX RATE SCHED.)	8	961065	-695421	265644
9 Credits (see instructions)	9			
10 Subtract line 9 from line 8. Enter the result, but not less than zero	10	961065	-695421	265644
11 Other taxes (such as self-employment tax, alternative minimum tax)	11			
12 Total tax liability (add lines 10 and 11)	12	961065	-695421	265644
13 Federal income tax withheld and excess FICA and RRTA tax withheld	13	58		58
14 Estimated tax payments	14	720000		720000
15 Earned income credit	15			
16 Credit for Federal tax on fuels, regulated investment company, etc.	16			
17 Amount paid with Form 4868, Form 2688, or Form 2350 (application for extension of time to file)	17			250000
18 Amount paid with original return, plus additional tax paid after it was filed	18			
19 Add lines 13 through 18, column C	19			970058
Refund or Amount You Owe				
20 Overpayment, if any, as shown on original return (or as previously adjusted by IRS)	20			
21 Subtract line 20 from line 19 (see instructions)	21			970058
22 AMOUNT YOU OWE. If line 12, col. C, is more than line 21, enter difference. Please pay in full with this return	22			
23 REFUND to be received. If line 12, column C, is less than line 21, enter the difference	23			704414

Please Sign Here

Under penalties of perjury, I declare that I have filed an original return and that I have examined this amended return, including accompanying schedules and statements, and to the best of my knowledge and belief, this amended return is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which the preparer has any knowledge.

Your signature: Kelly M. O'Gilvie Date: 8-10-89

Spouse's signature (if joint return, BOTH must sign) Date

Paid Preparer's Use Only

Preparer's signature: [signature] Date: 8-10-89 Check if self-employed ☐ Preparer's social security no.

Firm's name (or yours if self-employed) and address: King & King, P.A. Attorneys
6135 E. CENTRAL P.O. BOX 8085
WICHITA, KS

E.I. No. 48-1058433
ZIP code 67208

For Paperwork Reduction Act Notice, see page 1 of separate instructions.

BE SURE TO COMPLETE PAGE 2

orm 1040X (Rev. 10-88)

Part I **Exemptions (see Form 1040 or Form 1040A Instructions)**

If you are not changing your exemptions, do no complete Part I.
If claiming more exemptions, complete lines 1-6 and, if applicable line 8.
If claiming fewer exemptions, complete lines 1-7.

		A. Number originally reported	B. Net change	C. Correct number
For tax years beginning after 1986 – yourself and spouse	1	1		1
Caution: For tax years beginning after 1986, if someone (such as your parent) can claim you as a dependent, you cannot claim an exemption for yourself. For tax years beginning before 1987 – yourself and spouse, 65 or over, blind	2			
Your dependent children who lived with you	3	2		2
Your dependent children who did not live with you due to divorce or separation	4			
Other dependents	5			
Total exemptions (add lines 1 through 5)	6	3		3
Multiply $1,850 ($1,900, for tax year 1987, $1,080, for tax year 1986, $1,040, for tax year 1985) by the number of exemptions claimed on line 6. Enter the result here and on page 1, line 6	7	5850		5850

Dependents (children and other) not claimed on original return:
Note: Complete column (b) or (c), whichever applies, only if amending your 1987 or 1988 return.

(a) Full name (first, initial, and last name)	(b) Check if under age 5	(c) If age 5 or over, dependent's social security number	(d) Relationship	(e) No of months lived in your home

No. of children on 6 who lived with you ▶ ☐

No. of your children on 6 who didn't live with you due to divorce or separation (see instructions) ▶ ☐

No. of other dependents listed on 6 ▶ ☐

If your child listed on line 6 didn't live with you but is claimed as your dependent under a pre-1985 agreement, check here ▶ ☐

Part II **Explanation of Changes to Income, Deductions, and Credits**

Enter the line number from page 1 for each item you are changing and give the reason for each change. Attach all supporting forms and schedules for items changed. Be sure to include your name and social security number on any attachments.

If the change pertains to a net operating loss carryback, a general business credit carryback, or, for tax year 1985, a research credit carryback, attach the schedule or form that shows the year in which the loss or credit occurred. See the instructions. Also, check here ▶ ☐

The taxpayer reported $2,483,646.00, which was his intestate share of a punitive damage award received on account of personal injury. The taxpayer contends that the amount is not taxable and should not have been included in gross income.

The award is either not income under Section 61 of the Internal Revenue Code of 1986, as amended, or is excluded from income under Section 104(a)(2) of Part III of Subchapter B, Chapter 1, Subtitle A of the Internal Revenue Code of 1986. Burford v. U.S., 642 F. Supp. 635 (1986).

Part III **Presidential Election Campaign Fund**

Checking below will not increase your tax or reduce your refund.

You did not previously want to have $1 go to the fund, but now want to ..... check here ▶ ☐
Joint return and spouse did not previously want to have $1 go to the fund, but now wants to ..... check here ▶ ☐

APPENDIX C — AMENDED COMPLAINT FILED AUGUST 22, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 90-1075-C

KELLY M. O'GILVIE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT

COMES NOW the Plaintiff, Kelly M. O'Gilvie, one of three intestate heirs of the Estate of Betty O'Gilvie, by and through on of his attorneys, King & King, P.A., and pursuant to leave of court first had and obtained to amend his complaint states:

Jurisdiction and Venue

1. This action is instituted pursuant to, and jurisdiction arises under, 28 U.S.C. 1346(a)(1) and 26 U.S.C. 6532(a)(1) and 7422(a), for the recovery of income tax and interest erroneously, illegally, wrongfully or excessively assessed and collected from Plaintiff.

2. Plaintiff, Kelly M. O'Gilvie, is an individual residing in

Benton, Kansas and within the District of Kansas. Plaintiff's late wife, Betty O'Gilvie, resided in Sedgwick County, Kansas at the time of her death. Betty O'Gilvie's estate was administered in the District Court, Probate Department, Sedgwick County, Kansas.

3. Defendant, United States of America, may be sued within this district pursuant to 28 U.S.C. 1391(e).

Count I

4. On 2 April 1983, Plaintiff's wife, Betty O'Gilvie, died as a result of toxic shock syndrome. Kelly M. O'Gilvie in his individual capacity, and as the natural guardian of Kevin and Stephanie O'Gilvie, sued Playtex International, Inc. in the United States District Court for the District of Kansas for wrongful death and for his late wife's conscious pain and suffering. The case was tried to a jury.

5. In 1985 the jury returned a verdict for the Plaintiff's in their individual capacities for pecuniary and nonpecuniary damages, which amounts were excluded from the income of the recipients under 26 U.S.C. 104(a)(2). The jury also awarded damages for conscious pain and suffering in the amount of two hundred thousand dollars ($200,000.00) and punitive damages to the Estate of Betty O'Gilvie in the amount of ten million dollars ($10,000,000.00). The award, net of attorney's fees and expenses, was paid in 1988.

6. On 13 June 1989, Plaintiff, Kelly M. O'Gilvie , as administrator of the Estate of Betty O'Gilvie, caused the estate's 1988 income tax return Form 1041 to be filed with the Internal Revenue Service at Austin, Texas. This Form 1041 included $4,967,292.00 as gross income representing the punitive

damage award, net of attorney's fees and case expenses, received in 1988 from Playtex International, Inc.

7. On 4 August 1989, Plaintiff, Kelly M. O'Gilvie, in his individual capacity as an intestate heir of the Estate of Betty O'Gilvie, included in his gross income the Amount of $2,483,646.00 as his intestate share of such punitive damage award. 26 U.S.C. 662(b).

8. When it was determined that the punitive damage award was either not gross income or was excludible from gross income under 26 U.S.C. 104(a)(2), Plaintiff, Kelly M. O'Gilvie, as administrator of the Estate of Betty O'Gilvie and in his individual capacity as an intestate heir of the Estate of Betty O'Gilvie, filed on 9 August 1989 an amended Form 1041 for the Estate of Betty O'Gilvie and a Form 1040X for himself reporting thereon a net decrease in gross income in the amounts of $4,967,292.00 and $2,283,646.00, respectively. The decrease in gross income results in the overpayment of income tax by Kelly M. O'Gilvie in his individual capacity of $695,415.00. Kelly M. O'Gilvie, in his individual capacity, requests a refund in that amount plus interest.

9. More than six (6) months have elapsed since the filing of the amended Form 1041 and the Form 1040X and the Secretary of the Treasury has not rendered a decision thereon. Plaintiff is therefore entitled to bring this action. 26 U.S.C. 6532(a).

10. Plaintiff, Kelly M. O'Gilvie, has overpaid his federal income tax in the amount of $695,415.00 which amount, together with interest as provided by law on overpayments, is due and owing to Plaintiff from Defendant.

Appendix C

11. Attached hereto is a copy of Plaintiff's 1988 Form 1040X.

12. The action of Defendant, through the Secretary of the Treasury, in refusing to refund income tax overpaid by Plaintiff was erroneous, illegal, wrongful or excessive.

13. No assignment or transfer has been made regarding any part of Plaintiff's claim.

Count II

14. Judgment was not initially entered on the full amount of the jury's verdict. The trial court reduced the jury's verdict for punitive damages and entered judgment in the amount of $1,350,000.00. *Kelly M. O'Gilvie v. International Playtex, Inc.*, 609 F.Supp. 817, 820 (D. Kan. 1985). On appeal the judgment of the trial court was reversed and the case remanded with instructions to the trial court to enter judgment in accordance with the jury's verdict. *O'Gilvie v. International Playtex*, 821 F.2d 1438, 1450 (10th Cir. 1987), *cert. den.* 486 U.S. 1032, 100 L.Ed.2d 601 (1988). Judgment was entered in 1988 to include the $10,000,000.00 jury verdict.

15. The interest which accrued on the judgment in the amount of $1,350,000.00 between 1985 and 1988 and which was paid in 1988 is conceded to be gross income. The interest which was paid on the amount which the Tenth Circuit Court of Appeals ordered reinstated in accordance with the jury's verdict is gross income from the day of the entry of that judgment in 1988 until paid, but not before. This amount fits squarely into the parenthetical clause found at 26 U.S.C. 104(a)(2) and was either not gross income or was excludible from gross income.

Appendix C

16. Plaintiff filed an amended Form 1040X for himself reporting thereon a net decrease in gross income in the amount of $875,000.00. The decrease in gross income results in the additional overpayment by Kelly M. O'Gilvie of $260,437.00.

17. More than six (6) months have elapsed since the February 12, 1991 filing of the Amended Form 1040X and the Secretary of the Treasury has not rendered a decision thereon. Plaintiff is therefore entitled to bring this action. 26 U.S.C. 6532(a).

18. Plaintiff, Kelly M. O'Gilvie, has overpaid his federal income tax in the amount of $260,437.00 which amount, together with interest as provided by law on overpayments, is due and owing to Plaintiff from Defendant.

19. Attached is a copy of Plaintiff's 1988 Amended Form 1040X.

20. The action of Defendant, through the Secretary of the Treasury, in refusing to refund income tax overpaid by Plaintiff was erroneous, illegal, wrongful or excessive.

21. No assignment or transfer has been made regarding any part of Plaintiff's claim.

WHEREFORE, Plaintiff prays that judgment be entered in his favor in the amount of $695,415.00 for Count I of the Amended Complaint and $260,437.00 for Count II of this Amended Complaint, for a total of $995,852.00, together with interest as provided by law on the overpayment and the costs of this action.

Appendix C

s/ John C. King
John C. King #13827
King & King, P.A.
P.O. Box 782106
Wichita, Kansas 67278
(316) 682-3000
(316) 686-2000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of August, 1991, a true and correct copy of the above and foregoing Amended Complaint was placed in the United States mail, postage prepaid, properly addressed to:

Noreene C. Stehlik
Trial Attorney
Office of Special Litigation
Tax Division
Department of Justice
P.O. Box 7238
Washington, D.C. 20044

s/ John C. King
John C. King

Department of the Treasury—Internal Revenue Service

1040X (Rev. October 1989) (O)

Amended U.S. Individual Income Tax Return

► See separate instructions.

OMB No. 1545-0091
Expires 9-30-92

This return is for calendar year ► 19 88 , OR fiscal year ended ► , 19 .

Please print or type

Your first name and initial	Last name	Your social security number
Kelly M.	O'Gilvie	514 : 70 : 2944
If a joint return, spouse's first name and initial	Last name	Spouse's social security number
		: :
Home address (number and street). (If a P.O. box, see instructions.)	Apt. no.	Telephone number (optional)
c/o John C. King, P. O. Box 8085		(316) 686-2000
City, town or post office, state, and ZIP code. (If a foreign address, see instructions.)		For Paperwork Reduction Act Notice, see page 1 of separate instructions.
Wichita, Kansa 67208-0085		

Enter name and address as shown on original return (if same as above, write "Same"). If changing from separate to joint return, enter names and addresses from original returns.

Same

A Service center where original return was filed: Austin, Texas

B Has original return been changed or audited by IRS? . . . . ☐ Yes ☒ No
If "No," have you been notified that it will be? . . . . . ☐ Yes ☒ No
If "Yes," identify IRS office ►

C Are you amending your return to include any item (loss, credit, deduction, other tax benefit, or income) relating to a tax shelter required to be registered? . . . . . ☐ Yes ☒ No
If "Yes," you MUST attach Form 8271, Investor Reporting of Tax Shelter Registration Number.

D Filing status claimed. (Note: *You cannot change from joint to separate returns after the due date has passed.*)

On original return ► ☐ Single ☐ Married filing joint return ☒ Married filing separate return ☐ Head of household ☐ Qualifying widow(er)
On this return ► ☐ Single ☐ Married filing joint return ☒ Married filing separate return ☐ Head of household ☐ Qualifying widow(er)

Income and Deductions (see instructions) (Note: Be sure to complete page 2)		A. As originally reported or as adjusted (see instructions)	B. Net change—Increase or (Decrease)—explain on page 2	C. Correct amount
1 Total income	1	3,426,018.	(3,358,646.)	67,372.
2 Adjustments to income	2			
3 Adjusted gross income (subtract line 2 from line 1)	3	3,426,018.	(3,358,646.)	67,372.
4 Deductions	4	2,500.		
5 Subtract line 4 from line 3	5	3,423,518.	(3,358,646.)	64,872.
6 Exemptions	6	5,850.		5,850.
7 Taxable income (subtract line 6 from line 5)	7	3,417,668.	(3,358,646.)	59,022.
8 Tax (see instructions). (Method used in col. C .....)	8	961,065.	(946,859.)	14,206.
9 Credits (see instructions)	9			
10 Subtract line 9 from line 8. Enter the result, but not less than zero	10	961,065.	(946,859.)	14,206.
11 Other taxes (such as self-employment tax, alternative minimum tax)	11			
12 For tax year 1989, supplemental Medicare premium	12			
13 Total tax and any Medicare premium (add lines 10, 11, and 12)	13	961,065.	(946,859.)	14,206.
14 Federal income tax withheld and excess FICA and RRTA tax withheld	14	58.		58.
15 Estimated tax payments	15	720,000.		720,000.
16 Earned income credit	16			
17 Credits for Federal tax on fuels, regulated investment company, etc.	17			
18 Amount paid with Form 4868, Form 2688, or Form 2350 (application for extension of time to file)	18			250,000.
19 Amount paid with original return, plus additional tax paid after it was filed	19			
20 Add lines 14 through 19 in column C	20			970,058.
Refund or Amount You Owe				
21 Overpayment, if any, as shown on original return (or as previously adjusted by IRS)	21			
22 Subtract line 21 from line 20 (see instructions)	22			970,058.
23 **AMOUNT YOU OWE.** If line 13, col. C, is more than line 22, enter difference. Please pay in full with this return	23			
24 **REFUND** to be received. If line 13, column C, is less than line 22, enter difference	24			955,852.

Under penalties of perjury, I declare that I have filed an original return and that I have examined this amended return, including accompanying schedules and statements, and to the best of my knowledge and belief, this amended return is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which the preparer has any knowledge.

Please sign here

Your signature: Kelly M. O'Gilvie — Date: 2/1/91

Spouse's signature (if joint return, BOTH must sign) — Date

Paid preparer's use Only

Preparer's signature — Date: 2-1-91 — Check if self-employed ☐ — Preparer's social security no.

Firm's name (or yours if self-employed) and address: King & King, P.A., P. O. Box 8085, Wichita, Kansas — E.I. No. 48-1058433 — ZIP code 67208

Part I Exemptions (see Form 1040 or Form 1040A Instructions)

If you are not changing your exemptions, do not complete Part I.
If claiming more exemptions, complete lines 25–32 and, if applicable, line 33.
If claiming fewer exemptions, complete lines 25–31.

		A. Number originally reported	B. Net change	C. Correct number
5 For tax years beginning after 1986—yourself and spouse Caution: *For tax years beginning after 1986, if someone (such as your parent) can claim you as a dependent, you cannot claim an exemption for yourself.*	25			
6 For tax year 1986—yourself and spouse, 65 or older, blind	26			
7 Your dependent children who lived with you	27			
8 Your dependent children who did not live with you due to divorce or separation	28			
9 Other dependents	29			
0 Total exemptions (add lines 25 through 29)	30			
1 Multiply $2,000 ($1,950 for tax year 1988, $1,900 for tax year 1987, $1,080 for tax year 1986) by the number of exemptions claimed on line 30. Enter the result here and on page 1, line 6	31			

2 Dependents (children and other) not claimed on original return:
Note: *If amending your 1986 return, do not complete column (b) or (c) below.*

(a) Dependent's name (first, initial, and last name)	(b) Check if under age 2 (under age 5 if a 1987 or 1988 return)	(c) If age 2 or older (age 5 or older if a 1987 or 1988 return) dependent's social security number	(d) Relationship	(e) No. of months lived in your home

No. of your children on line 32 who lived with you ▶ ☐
No. of your children on line 32 who didn't live with you due to divorce or separation (see instructions) ▶ ☐
No. of other dependents listed on line 32 ▶ ☐

3 If your child listed on line 32 didn't live with you but is claimed as your dependent under a pre-1985 agreement, check here ▶ ☐

Part II Explanation of Changes to Income, Deductions, and Credits

Enter the line number from page 1 for each item you are changing and give the reason for each change. Attach all supporting forms and schedules for items changed. Be sure to include your name and social security number on any attachments.

If the change pertains to a net operating loss carryback or a general business credit carryback, attach the schedule or form that shows the year in which the loss or credit occurred. See the instructions. Also, check here ▶ ☐

The taxpayer reported $2,483,646.00, which was his intestate share of a punitive damage award received on account of personal injury. The taxpayer contends that the amount is not taxable and should not have been included in gross income.

The taxpayer reported $948,632.00 as his intestate share of amounts received on account of personal injury and characterized as interest. The taxpayer contends that $875,000.00 of that amount is not taxable and that it should not have been included in gross income.

The award is either not income under Section 61 of the Internal Revenue Code of 1986, as amended, or is excluded from income under Section 104(a)(2) of Part III of Subchapter B, Chapter 1, Subtitle A of the Internal Revenue Code of 1986. Burford v. U.S., 642 F. Supp. 635 (1986). The $875,000.00 amount is excludible under the same reasoning as the punitive damages and in particular the fourteen (14) word parenthetical clause to Section 104(a)(2) of the Internal Revenue Code of 1986.

Part III Presidential Election Campaign Fund

Checking below will not increase your tax or reduce your refund.

If you did not previously want to have $1 go to the fund, but now want to . . . . . check here ▶ ☐
If joint return and your spouse did not previously want to have $1 go to the fund, but now wants to . . . . . check here ▶ ☐

☆ U.S.GPO:1989-243-302 E.I.43-1410166

Department of the Treasury — Internal Revenue Service

1040X — Amended U.S. Individual Income Tax Return

OMB No. 1545-0091
Expires 6-30-90

(Rev. October 1988)

This return is for calendar year ▶ 1988 , OR fiscal year ended ▶ , 19

Your first name and initial (if joint return, also give spouse's name and initial) | Last name | Your social security number
Kelly M. O'Gilvie | | 514-70-2944

Present home address (number and street, including apt. no. or rural route). (If you have a P.O. box, see instructions.) | Spouse's social security number
c\o John C. King P.O. Box 8085 | Unknown

City, town or post office, state, and ZIP code | Telephone number (optional)
Wichita, KS 67208-0085 | 316-686-2000

RECEIVED
AUG 2 1989
IRS
Wichita, Kansas

Enter below name and address as shown on original return (if same as above, write "Same"). If changing from separate to joint return, enter names and addresses used on original returns.
Note: You cannot change from joint to separate returns after the due date has passed.)

SAME

A Service center where original return was filed
Austin, Texas

B Has original return been changed or audited by IRS? ..... ☐ Yes ☒ No
If "No," have you been notified that it will be? ..... ☐ Yes ☒ No
If "Yes," identify IRS office ▶

C Are you amending your return to include any item (loss, credit, deductions, other tax benefit, or income) relating to a tax shelter required to be registered? ..... ☐ Yes ☒ No
If "Yes," you MUST attach Form 8271 Investor Reporting of Tax Shelter Registration Number.

D Filing status claimed. (Note: You cannot change from joint to separate returns after the due date has passed.)
On original return .. ▶ ☐ Single ☐ Married filing joint return ☒ Married filing separate return ☐ Head of household ☐ Qualifying widow(er)
On this return ..... ▶ ☐ Single ☐ Married filing joint return ☒ Married filing separate return ☐ Head of household ☐ Qualifying widow(er)

Income and Deductions (see instructions)		A. As originally reported or as adjusted (see instructions)	B. Net change - increase or (decrease) - explain on page 2	C. Correct amount
1 Total income	1	3426018	-2483646	942372
2 Adjustments to income	2			
3 Adjusted gross income (subtract line 2 from line 1)	3	3426018	-2483646	942372
4 Deductions	4	2500		2500
5 Subtract line 4 from line 3	5	3423518	-2483646	939672
6 Exemptions	6	5850		5850
7 Taxable income (subtract line 6 from line 5)	7	3417668	-2483646	934022
8 Tax (see instructions). (Method used in col. C TAX RATE SCHED.)	8	961065	-695421	265644
9 Credits (see instructions)	9			
10 Subtract line 9 from line 8. Enter the result, but not less than zero	10	961065	-695421	265644
11 Other taxes (such as self-employment tax, alternative minimum tax)	11			
12 Total tax liability (add lines 10 and 11)	12	961065	-695421	265644
13 Federal income tax withheld and excess FICA and RRTA tax withheld	13	58		58
14 Estimated tax payments	14	720000		720000
15 Earned income credit	15			
16 Credit for Federal tax on fuels, regulated investment company, etc.	16			
17 Amount paid with Form 4868, Form 2688, or Form 2350 (application for extension of time to file)	17	250000		
18 Amount paid with original return, plus additional tax paid after it was filed	18			
19 Add lines 13 through 18, column C	19	$70058		
Refund or Amount You Owe				
20 Overpayment, if any, as shown on original return (or as previously adjusted by IRS)	20			
21 Subtract line 20 from line 19 (see instructions)	21	$70058		
22 AMOUNT YOU OWE. If line 12, col. C, is more than line 21, enter difference. Please pay in full with this return	22			
23 REFUND to be received. If line 12, column C, is less than line 21, enter the difference	23	704414		

Please Sign Here

Under penalties of perjury, I declare that I have filed an original return and that I have examined this amended return, including accompanying schedules and statements, and to the best of my knowledge and belief, this amended return is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which the preparer has any knowledge.

Kelly M. O'Gilvie 10-10-89
Your signature — Date

Spouse's signature (if joint return, BOTH must sign) — Date

Paid Preparer's Use Only

Preparer's signature — Date 10-10-89 — Check if self-employed ☐ — Preparer's social security no.

Firm's name (or yours if self-employed) and address: King, Kinc, P.A. Attorneys
6135 E. CENTRAL P.O. BOX 8085
WICHITA, KS

E.I. No. 48-1058433
ZIP code 67208

For Paperwork Reduction Act Notice, see page 1 of separate instructions.

BE SURE TO COMPLETE PAGE 2

Appendix C

35a

1040X (Rev. 10-88)

Page 2

Part I **Exemptions (see Form 1040 and Form 1040A instructions)**

If you are not changing your exemptions, do not complete Part I.
If claiming more exemptions, complete lines 1–6 and, if applicable, line 8.
If claiming fewer exemptions, complete lines 1–7.

		A. Number originally reported	B. Net change	C. Correct number
For tax years beginning after 1986 – yourself and spouse	1	1		1
Caution: For tax years beginning after 1986, if someone (such as your parent) can claim you as a dependent, you cannot claim an exemption for yourself.				
For tax years beginning before 1987 – yourself and spouse, 65 or over, blind	2			
Your dependent children who lived with you	3	2		2
Your dependent children who did not live with you due to divorce or separation	4			
Other dependents	5			
Total exemptions (add lines 1 through 5)	6	3		3
Multiply $1,850 ($1,800, for tax year 1987, $1,080, for tax year 1986, $1,040, for tax year 1985) by the number of exemptions claimed on line 6. Enter the result here and on page 1, line 6	7	5850		5850

Dependents (children and other) not claimed on original return:
Note: Complete column (b) or (c), whichever applies, only if amending your 1987 or 1988 return.

(a) Full name (first, initial, and last name)	(b) Check if under age 5	(c) If age 5 or over, dependent's social security number	(d) Relationship	(e) No. of months lived in your home

No. of children on 6 who lived with you ▶ ☐

No. of your children on 6 who didn't live with you due to divorce or separation (see instructions) ▶ ☐

No. of other dependents listed on 6 ▶ ☐

If your child listed on line 8 didn't live with you but is claimed as your dependent under a pre-1985 agreement, check here ▶ ☐

Part II **Explanation of Changes to Income, Deductions, and Credits**

Enter the line number from page 1 for each item you are changing and give the reason for each change. Attach all supporting forms and schedules for items changed. Be sure to include your name and social security number on any attachments.

If the change pertains to a net operating loss carryback, a general business credit carryback, or, for tax year 1985, a research credit carryback, attach the schedule or form that shows the year in which the loss or credit occurred. See the instructions. Also, check here ▶ ☐

The taxpayer reported $2,483,646.00, which was his intestate share of a punitive damage award received on account of personal injury. The taxpayer contends that the amount is not taxable and should not have been included in gross income.

The award is either not income under Section 61 of the Internal Revenue Code of 1986, as amended, or is excluded from income under Section 104(a)(2) of Part III of Subchapter B, Chapter 1, Subtitle A of the Internal Revenue Code of 1986. Burford v. U.S., 642 F. Supp. 635 (1986).

Part III **Presidential Election Campaign Fund**

Checking below will not increase your tax or reduce your refund.

You did not previously want $1 to go to the fund, but now want to ..... check here ▶ ☐
Joint return and spouse did not previously want $1 to go to the fund, but now wants to ..... check here ▶ ☐

Form **1041** — Department of the Treasury, Internal Revenue Service

U.S. Fiduciary Income Tax Re..

For the calendar year 1988 or fiscal year beginning , 1988, and ending , 19

OMB No 1545-0092

1988

Check applicable boxes:
- [X] Decedent's estate
- [ ] Simple trust
- [ ] Complex trust
- [ ] Grantor type trust
- [ ] Bankruptcy estate
- [ ] Family estate trust
- [ ] Pooled income fund
- [ ] Initial return
- [ ] Amended return
- [ ] Final return

Name of estate or trust (grantor type trust, see instructions): Betty O'Gilvie Estate

Employer identification number: 48-6292710

Name and title of fiduciary: O'Gilvie Kelly M. ADM

Date entity created: 2 April 1983

Address of fiduciary (number and street or P.O. Box): c/o John C. King P.O. Box 8085

Nonexempt charitable and split-interest trusts, check applicable boxes (see instructions):
- [ ] Described in section 4947(a)(1)
- [ ] Not a private foundation
- [ ] Described in section 4947(a)(2)

City, state, and ZIP code: Wichita, Kansas 67208-0085

Number of Schedules K-1 attached (See instructions) ► -

Income	1	Dividends		1
	2	Interest income		2 1 724784
	3	Income (or losses) from partnerships, other estates or other trusts (see instructions)		3
	4	Net rent and royalty income (or loss) (attach Schedule E (Form 1040))		4
	5	Net business and farm income (or loss) (attach Schedules C and F (Form 1040))		5
	6	Capital gain (or loss) (attach Schedule D (Form 1041))		6
	7	Ordinary gain (or loss) (attach Form 4797)		7
	8	Other income (state nature of income)		8
	9	Total income (add lines 1 through 8)	►	9 1,724784
Deductions	10	Interest	10	
	11	Taxes	11	
	12	Fiduciary fees	12	
	13	Charitable deduction (from Schedule A, line 6)	13	
	14	Attorney, accountant, and return preparer fees	14	
	15	Other deductions (attach schedule)	15	
	16	Total (add lines 10 through 15)	►	16
	17	Adjusted total income (or loss) (subtract line 16 from line 9)		17 1,724784
	18	Income distribution deduction (from Schedule B, line 17) (see instructions) (attach Schedule K-1 (Form 1041))		18 1,724784
	19	Estate tax deduction (including generation-skipping transfer taxes) (attach computation)		19
	20	Exemption		20 600
	21	Total (add lines 18 through 20)	►	21 1,724184
	22	Taxable income of fiduciary (subtract line 21 from line 17)	►	22 none
Please attach check or money order here. Tax and Payments	23	Total tax (enter amount from line 7, Schedule G)		23
	24a	Payments: 1988 estimated tax payments and amount applied from 1987 return		24a
	b	Treated as paid by trust beneficiaries (attach Form 1041-T)		24b
	c	Subtract line 24b from line 24a		24c
	d	Tax paid with extension of time to file ☐ Form 8736 ☐ Form 8800 ☐ Form 2758		24d
	e	Federal income tax withheld		24e
		Credits:		
	f	Form 2439 ....; g Form 4136 ....; h Form 6249		24f
	25	Total (add lines 24c through 24e, and 24f)	►	25
	26	If line 23 is larger than line 25, enter TAX DUE		26
	27	If line 25 is larger than line 23, enter OVERPAYMENT		27
	28	Amount of line 27 to be: a Credited to 1989 estimated tax ► ..... b Refunded	►	28
	29	Penalty for underpayment of estimated tax Check ☐ If Form 2210 (Form 2210F) is attached		29

Taxpayer Service Div. RECEIVED AUG 4 1988 IRS Wichita, Kansas

Please Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than fiduciary) is based on all information of which preparer has any knowledge

Kelly M O'Gilvie ADM. — 27 July 88 — 514-70-2944

Signature of fiduciary or officer representing fiduciary — Date — EIN of fiduciary (see instructions)

Paid Preparer's Use Only

Preparer's signature — Date 27 July 88 — Check if self-employed ► ☐ — Preparer's social security no.

Firm's name (or yours if self-employed) and address: King & King, P.A. Attorneys, P.O. Box 8085, Wichita, Kansas — E.I. No ► 48 1058433 — ZIP code ► 67208-0085

For Paperwork Reduction Act Notice, see page 1 of the instructions. — Form 1041 (1988)

Schedule A Charitable Deduction—*Do not complete for a simple trust or a pooled income fund.*
(Write the name and address of each charitable organization to whom your contributions total $3,000 or more on an attached sheet.)

1	Amounts paid or permanently set aside for charitable purposes from current year's gross income	1	
2	Tax-exempt interest allocable to charitable distribution (see instructions)	2	
3	Balance (subtract line 2 from line 1)	3	
4	Enter the net short-term capital gain and the net long-term capital gain of the current tax year allocable to corpus paid or permanently set aside for charitable purposes	4	
5	Amounts paid or permanently set aside for charitable purposes from gross income of a prior year (see instructions)	5	
6	Total (add lines 3, 4, and 5). Enter here and on page 1, line 13	6	

Schedule B Income Distribution Deduction (See instructions)

1	Adjusted total income (Enter amount from page 1, line 17.) (see instructions)		1	1,724784
2	Adjusted tax-exempt interest (see instructions)		2	
3	Net gain shown on Schedule D (Form 1041), line 17, column (a) (if net loss, enter zero.)		3	
4	Enter amount from Schedule A, line 4		4	
5	Long-term capital gain included on Schedule A, line 1		5	
6	Short-term capital gain included on Schedule A, line 1		6	
7	If the amount on page 1, line 6, is a capital loss, enter here as a positive figure		7	
8	If the amount on page 1, line 6, is a capital gain, enter here as a negative figure		8	
9	Distributable net income (combine lines 1 through 8)		9	1,724784
10	Amount of income for the tax year determined under the governing instrument (accounting income)	10		
11	Amount of income required to be distributed currently (see instructions)		11	
12	Other amounts paid, credited, or otherwise required to be distributed (see instructions)		12	6,791424
13	Total distributions (add lines 11 and 12). (If greater than line 10, see instructions.)		13	6,791424
14	Enter the total amount of tax-exempt income included on line 13		14	
15	Tentative income distribution deduction (subtract line 14 from line 13)		15	6,791424
16	Tentative income distribution deduction (subtract line 2 from line 9)		16	1,724784
17	Income distribution deduction (Enter the smaller of line 15 or line 16 here and on page 1, line 18.)		17	1,724784

Schedule G Tax Computation (See instructions)

1	Tax: a Tax rate schedule ....; b Other tax .... Total ►		1c	
2a	Foreign tax credit (attach Form 1116)	2a		
b	Credit for fuel produced from a nonconventional source	2b		
c	General business credit. Check which forms are attached: ☐ Form 3800 ☐ Form 3468 ☐ Form 5884 ☐ Form 6478 ☐ Form 6765 ☐ Form 8586	2c		
d	Credit for prior year minimum tax (attach Form 8801)	2d		
3	Total (add lines 2a through 2d) ►		3	
4	Subtract line 3 from line 1c		4	
5	Recapture taxes. Check if from: ☐ Form 4255 ☐ Form 8611		5	
6	Alternative minimum tax (attach Form 8656)		6	
7	Total (add lines 4 through 6). Enter here and on line 23, page 1 ►		7	

Taxpayer Service Ctr. RECEIVED. AUG 2 1989

Other Information

		Yes	No
1	If the fiduciary's name or address has changed, enter the old information ►		
2	Did the estate or trust receive tax-exempt income? (If "Yes," attach a computation of the allocation of expenses.) Enter the amount of tax-exempt interest income ► $		
3	Did the estate or trust have any passive activity loss(es)? (If "Yes," enter the amount of any such loss(es) on Form 8582, Passive Activity Loss Limitations, to figure the allowable loss.)		
4	Did the estate or trust receive all or any part of the earnings (salary, wages, and other compensation) of any individual by reason of a contract assignment or similar arrangement?		
5	At any time during the tax year, did the estate or trust have an interest in or a signature or other authority over a financial account in a foreign country (such as a bank account, securities account, or other financial account)? (See the instructions for exceptions and filing requirements for Form TD F 90-22.1) If "Yes," enter the name of the foreign country ►		
6	Was the estate or trust the grantor of, or transferor to, a foreign trust which existed during the current tax year, whether or not the estate or trust has any beneficial interest in it? (If "Yes," you may have to file Form 3520, 3520-A, or 926.)		
7	Check this box if this entity has filed or is required to file Form 8264, Application for Registration of a Tax Shelter ► ☐		
8	Check this box if this entity is a complex trust making the section 663(b) election ► ☐		
9	Check this box if a section 643(e)(3) election is made (attach Schedule D (Form 1041)) ► ☐		
10	Check this box if the decedent's estate has been open for more than 2 years (see instructions) ► ☐		

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APPENDIX D — ANSWER TO AMENDED COMPLAINT FILED SEPTEMBER 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 90-1075-C

KELLY M. O'GILVIE,

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.

ANSWER TO AMENDED COMPLAINT

Defendant, the United States of America, by its undersigned attorneys, answers plaintiff's Amended Complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of plaintiff's Amended Complaint, except defendant admits that, if jurisdiction exists, it exists pursuant to 28 U.S.C. Section 1346(a)(1).

2. Defendant admits the allegations contained in paragraph 2 of plaintiff's Amended Complaint.

3. Defendant denies the allegations contained in paragraph 3 of plaintiff's Amended Complaint, except defendant admits that this suit may be prosecuted in this district pursuant to 28 U.S.C. Section 1402(a)(1).

Appendix D

4-7. Defendant admits the allegations contained in paragraphs 4-7 of plaintiff's Amended Complaint.

8. Defendant denies the allegations contained paragraph 8 of plaintiff's Amended Complaint, except defendant admits that plaintiff, Kelly M. O'Gilvie, as administrator of the Estate of Betty O'Gilvie and in his individual capacity as an intestate heir of the Estate of Betty O'Gilvie, filed on 9 August 1989 an amended 1988 federal income tax return (Form 1041) for the Estate of Betty O'Gilvie and an amended 1988 federal income tax return (Form 1040X) for himself reporting thereon a net decrease in gross income in the amounts of $4,967,292.00 and $2,483,646.00, respectively. Defendant also admits that Kelly M. O'Gilvie, in his individual capacity, request a refund of $695,415 plus interest. Defendant denies that plaintiff is entitled to a refund.

9. Defendant admits the allegations contained in paragraph 9 of plaintiff's Amended Complaint.

10. Defendant denies the allegations contained in paragraph 10 of plaintiff's Amended Complaint.

11. Defendant admits that attached to plaintiff's Amended Complaint is a copy of plaintiff's 1988 Form 1040X. Defendant denies each and every allegation contained therein unless otherwise specifically admitted.

12. Defendant denies the allegations contained in paragraph 12 of plaintiff's Amended Complaint.

13. Defendant lacks information or knowledge sufficient to affirm or deny the allegations contained in paragraph 13 of plaintiff's Amended Complaint.

Appendix D

14. Defendant admits the allegations contained in paragraph 14 of plaintiff's Amended Complaint.

15. Defendant accepts the concession contained in the first sentence of paragraph 15 of plaintiff's Amended Complaint. Defendant denies the allegations contained in the second and third sentences of paragraph 15 of plaintiff's Amended Complaint.

16. Defendant admits that plaintiff filed an amended 1988 Form 1040X for himself reporting thereon a net decrease in gross income in the amount of $875,000.00, but defendant denies that plaintiff's income for 1988 was decreased by that amount. Defendant also denies that plaintiff is due an additional overpayment of $260,437.00.

17. Defendant admits the allegations contained in paragraph 17 of plaintiff's Amended Complaint.

18. Defendant denies the allegations contained in paragraph 18 of plaintiff's Amended Complaint.

19. Defendant admits that attached to plaintiff's Complaint is a copy of plaintiff's 1988 second Form 1040X. Defendant denies each and every allegation contained therein unless otherwise specifically admitted.

20. Defendant denies the allegations contained in paragraph 20 of plaintiff's Complaint.

21. Defendant lacks information or knowledge sufficient to affirm or deny the allegations contained in paragraph 21 of plaintiff's Complaint.

Appendix D

WHEREFORE, defendant, the United States of America, having answered fully, prays that plaintiff's Complaint be dismissed with prejudice and that he recover nothing; and for such other and further relief as the Court deems just and proper.

LEE THOMPSON
United States Attorney

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 90-1075-C

KELLY M. O'GILVIE,

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing ANSWER has been made this 9th day of September 1991, by mailing a true copy thereof to:

John C. King, Esquire
King & King, P.A.
6135 E. Central
P.O. Box 782106
Wichita, Kansas 67208

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
Tax Division
Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489
(FTS) 368-6489

APPENDIX E — MOTION FOR SUMMARY JUDGMENT (UNITED STATES) FILED APRIL 12, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 90-1075

KELLY M. O'GILVIE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

UNITED STATES' MOTION FOR SUMMARY JUDGMENT

Defendant, the United States of America, hereby moves this Court, pursuant of Fed. R. Civ. P. 56(a), for an Order granting summary judgment in favor of the United States for the reasons given in the accompanying memorandum.

LEE THOMPSON
United States Attorney

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
Office of Special Litigation
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489

APPENDIX F — MOTION FOR SUMMARY JUDGMENT (O'GILVIE) FILED APRIL 15, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 90-1075-C

KELLY M. O'GILVIE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Kelly M. O'Gilvie, moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment against the Defendant, the United States of America. The grounds for this Motion, as more fully stated in Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment filed herewith, are:

1. That there is no genuine issue as to any material fact in the above-captioned case; and

2. That the Plaintiff is entitled to judgment as a matter of law based upon the record before this Court.

Appendix F

KING & KING, P.A.

s/ John C. King
John C. King #13827

s/ Linda D. King
Linda D. King #13004

6135 E. Central
P.O. Box 8085
Wichita, Kansas 67208
(316) 686-2000

APPENDIX G — MOTION FOR SUMMARY JUDGMENT (O'GILVIE) FILED NOVEMBER 11, 1992

JOHN C. KING #13827
LAW OFFICE OF JOHN C. KING, LTD.
260 N. Rock Road, Suite 128
P.O. Box 782106
Wichita, Kansas 67278
(316) 682-3000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 90-1075-B

KELLY M. O'GILVIE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR SUMMARY JUDGMENT

Plaintiff, Kelly M. O'Gilvie, moves the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in his favor against the Defendant, the United States of America. This motion addresses the second of two legal issues in this case. Along with the Court's memorandum and order of August 26, 1992, it resolves all of the issues between the parties.

Appendix G

The grounds for this motion, as more fully stated in Plaintiff's memorandum in support of the same, filed herewith, are that:

1. There is no genuine issue as to any material fact in the above-captioned case; and

2. The Plaintiff is entitled to judgment as a matter of law.

WHEREFORE, Plaintiff, Kelly M. O'Gilvie requests judgment in his favor in the amount of $260,437.00, in addition to the amount of $695,415.00 previously awarded, for a total of $955,852, plus interest at the rate established for overpayments under 26 U.S.C. § 6621(a)(1).

LAW OFFICE OF JOHN C. KING, LTD.

By s/ John C. King
John C. King #13827
P.O. Box 782106
Wichita, Kansas 67278
(316) 682-3000

LINDA D. KING
Attorney at Law, P.A.

By s/ Linda D. King
Linda D. King #13004
P.O. Box 8085
Wichita, Kansas 67208
(316) 686-2000

Appendix G

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion For Summary Judgment was mailed, postage prepaid, this 11th day of November, 1992, to:

Noreene C. Stehlik
Office of Special Litigation
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044

s/ John C. King
John C. King

APPENDIX H — OPPOSITION TO MOTION FOR SUMMARY JUDGMENT (UNITED STATES) FILED NOVEMBER 30, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 90-1075-C

KELLY M. O'GILVIE,

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.

UNITED STATES' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

The United States submits herewith its opposition to plaintiff's Motion for Summary Judgment. Plaintiff's motion must be denied because plaintiff has failed either to set forth or to support the facts upon which his motion relies. In the event the court resolves to reach the legal question posed in plaintiff's motion, the motion should nevertheless be denied and judgment granted to the United States as a matter of law.

ARGUMENT

Plaintiff would have this court hold that an unspecified amount of prejudgment interest (which plaintiff refers to as

"certain amounts" or "increased amount" and which he concedes "[i]n another setting . . . might be characterized as taxable interest income" (Pl. Mem. at 2, 3)) is excludable from income under Section 104(a)(2) of the Internal Revenue Code ("Code") (26 U.S.C.) as "damages received . . . on account of personal injur[y]." Plaintiff would also, apparently, have this Court hold that plaintiff is entitled to a refund of $260,437.00 in federal taxes, plus statutory interest thereon.

Plaintiff states in the body of his Memorandum that "[a]n increased amount was paid to Plaintiff in 1988, over and above his share of the jury's verdict." Pl. Mem., at 3. Plaintiff further states "[t]hat amount was calculated according to 28 U.S.C. § 1961(b) at the federal post-judgment rate." *Id.*, note 1. Plaintiff concedes (Pl. Mem. at 5-6) that a portion of the prejudgment interest he received on the damages award is includible in gross income.

1. *Plaintiff's statement of facts fails to show any receipt of interest payments.*

The party moving for summary judgment has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This plaintiff has failed to do.

Plaintiff's statement of "Uncontroverted Facts" simply incorporates by reference the "Uncontroverted Facts" set forth in his Motion for Summary Judgment filed on or about April 15, 1991. See Pl. Mem., at 1. Nowhere in that statement of facts does plaintiff state either the total amount of prejudgment interest he received, or how he calculated the portion which he alleges should not be denominated "interest" for purposes of Code

Section 104(a)(2). Were this case to proceed to trial, plaintiff would be required to prove these amounts. *E.g, Lewis v. Reynolds*, 284 U.S. 281, 283 (1931) (plaintiff in refund action bears burden not only of establishing that amount of assessment is incorrect, but also of establishing correct amount of tax).

Yet in his Memorandum plaintiff not even *stated*, let alone attempted to prove, the amount of prejudgment interest he received "over and above his share of the jury's verdict." Pl. Mem. at 3. The only clue to this amount is provided by plaintiff in his Amended Complaint, where he states that he

> filed an amended Form 1040X . . . reporting thereon a net decrease in gross income in the amount of $875,000.00. The decrease in gross income results in the additional overpayment by [plaintiff] of $260,437.00.

Amended Complaint, ¶ 16. The $875,000 figure, presumably, reflects the alleged prejudgment interest on the remittitur amount of $8,650,000 from the date of the jury's verdict in 1985 until the date of entry of the judgment in 1988. The $260,437 allegedly represents the amount of tax paid on the $875,000, and is the amount of the refund sought by plaintiff in this action. Amended Complaint, ¶ 18.

The Government is not willing to accept, without more, plaintiff's bald assertion that the round figure of $875,000 represents prejudgment interest on plaintiff's share of the $8.65 million remittitur which accrued between May 24, 1985 and June 10, 1988.[1] It is obvious that this particular interest sum would not

---

1. On the final page of his Memorandum plaintiff provides the dates (Cont'd)

have been calculated separately by either plaintiffs or defendants in *O'Gilvie v. International Playtex, Inc.*, 609 F. Supp. 817 (D. Kan. 1985), *aff'd in part and rev'd in part*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 406 U.S. 1032 (1988), because there would have been no need to do so. The *O'Gilvie* defendants simply paid the *O'Gilvie* plaintiffs the *total* jury award ($1.525 million in actual damages and $10 million in punitive damages, *see O'Gilvie v. Playtex, supra*), plus a *total* amount of interest, based on the $11.525 million in principal.

Until plaintiff is prepared to provide proof as to the amount of interest he alleges is excludable under Code Section 104(a)(2), and the correct amount of tax thereon, plaintiff's Motion for Summary Judgment must be denied because material facts are in dispute. And, as shown below, plaintiff's motion must also be denied because the interest income he received is not excludable from income.

2. *Interest awarded under 28 U.S.C. Section 1961 is not excludable from income under Code Section 104(a)(2).*

Interest is specifically includible in gross income. 26 U.S.C.

(Cont'd)
("[f]rom May 24, 1985 through June 10, 1988) between which the prejudgment interest which he would have this court hold is excludable from income was allegedly calculated. May 24, 1985 is the day the district court in *O'Gilvie v. International Playtex, Inc.*, 609 F. Supp. 817 (D. Kan. 1985) ordered a remittitur; and June 10, 1988 is the day the district court entered judgment in accordance with the mandate of the Tenth Circuit, which reversed the remittitur and ordered judgment entered in accordance with the jury's verdict. *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1450 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). The Government is willing to accept that the actions described took place on those two dates in 1985 and 1988, based on the published decisions and on its own examination of the docket sheet in *O'Gilvie v. International Playtex, Inc.*, 83-1846 (D. Kan.).

Section 61(a)(4). Interest income on nontaxable receipts is also taxable under Section 61. Treas. Reg. § 1.61-7(a). Plaintiff has stated that the post-verdict, prejudgment interest he received on the $8.65 million was calculated according to 28 U.S.C Section 1961(b). Pl. Mem. at 3, note 1. That section plainly denominates the payments received thereunder as "interest." Such payments are therefore includible in income, under Code Section 61(a)(4).

Including all post-verdict, prejudgment interest in income is also logically correct, regardless of whether the punitive damages award itself is included in income. The jury awarded plaintiff *damages*, based on the specific facts it found in the case. The *interest* plaintiff received arose only because of the delay between the date of the verdict and the date of entry of judgment.

This is also the conclusion of the only known case to have considered the question. In *Aames v. Commissioner*, 94 T.C. 189 (1990), the petitioner had received a malpractice award, together with interest thereon, in a state-court suit. After the decision was affirmed on appeal, the state court awarded petitioner prejudgment interest, from the date of the jury verdict to the date the judgment was affirmed on appeal. *Id.*, at 39,100. Petitioner did not report any of the prejudgment interest on his federal income tax return.

Petitioner Aames contended that the prejudgment interest should be considered an item of damages and therefore excludable from income pursuant to Code Section 104(a)(2). The court, noting that "[i]nterest awarded in a judgment is generally considered ordinary income, regardless of how the judgment itself is taxed," *id.*, at 39101 (citing *Wheeler v. Commissioner*, 58 T.C. 459, 461-62 (1972)), rejected plaintiff's argument. The court held that

> [t]he nature of interest is that it is paid because of delay in the receipt of funds, in this case the principal amount awarded to plaintiff and designated 'damages' by the [state] court. As interest, it is taxable to petitioner. . . . [and] must be included in petitioner's taxable income.

Id., at 39,102. The identical analysis applies here.

A similar reasoning underlies the well settled proposition that prejudgment interest paid in just compensation cases is taxable as ordinary, not capital, income. See, *e.g.*, *Kieselbach v. Commissioner*, 317 U.S. 399, 403 (1943). As the Supreme Court explained, the interest

> was paid because of the failure to put the award in the taxpayers' hands on the day . . . the property was taken. . . . It is income . . . paid to the taxpayer in lieu of what they might have earned on the sum found to be the value of the property on the day the property was taken.

* * *

> While without [the interest] payment, just compensation would not be received by the vendor, it does not follow that the additional payments are part of the sale price. . . . [J]ust compensation . . . is not the same thing as the sale price of a capital asset.

Id., at 403-04. *Kieselbach* remains good law. *See, e.g., Drayton v. United States*, 801 F.2d 117 (3d Cir. 1986) (holding *Kieselbach* mandated that interest portion of certificates paid to compensate shareholders be treated as ordinary, not capital, income). Although the question here is whether interest is income at all, not, as in Kieselbach, whether interest is capital or ordinary income, the case is still highly relevant. By treating interest as ordinary income, the *Kieselbach* court is expressly distinguishing the nature of interest paid on an award from the nature of the award itself.

Plaintiff's attempt to analogize the interest payments he received to periodic payments, which are excluded under Section 104(a)(2), is unavailing. That section merely permits the exclusion from gross income of "the amount of any damages received (whether by suit or agreement and whether as lump sums *or as periodic payments*) on account of personal injuries or sickness." 26 U.S.C. Section 104(a)(2). Nowhere does that section state or imply that any explicitly stated interest component of a damages award is excludable from income.

Plaintiff also tries to argue that, because the amount of his share of the punitive damages award "was not fixed and unconditional" until the court of appeals rendered its decision (Pl. Mem. at 3-4), the portion of the prejudgment interest at issue should therefore be excluded from gross income. This argument sweeps too broadly, however; it encompasses all prejudgment interest received by plaintiff (that is, the post-verdict, pre-remittitur interest, which plaintiff acknowledges is includible in income; as well as the post-remittitur prejudgment interest, which plaintiff is here contending is not includible in income). Such an argument can therefore have no special relevance to the post-remittitur prejudgment interest at issue.

Plaintiff also errs in arguing the interest was paid "[]n the absence of an unconditional, enforceable obligation to pay a principal sum." (Pl. Mem., at 4.) The interest was ordered to be paid by the Court of Appeals in the same order directing that judgment be entered in accordance with the jury's verdict. (Pl. Mem., at 4.) Thus, by the time the interest was ordered to be paid, plaintiff's share of the remittitur amount *was* fixed, unconditional, and enforceable.

In short, there is no reason that the interest received by plaintiff should be excluded from income. It should be treated no differently than the interest plaintiff earns on any private investment — fully taxable.

CONCLUSION

For the reasons given above, plaintiff's motion for summary judgment should be denied. If the court denies plaintiff's motion on the legal ground that interest income at issue is properly includible in income, then summary judgment should properly be entered in favor of the United States.

LEE THOMPSON
United States Attorney

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 90-1075-C

KELLY M. O'GILVIE

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing UNITED STATES' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT has been made this 30th day of November 1992, by mailing a true copy thereof to:

John C. King, Esquire
King & King, P.A.
P.O. Box 782106
Wichita, Kansas 67278

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
Tax Division
Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489

APPENDIX I — NOTICE OF APPEAL (O'GILVIE) FILED JANUARY 5, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 90-1075-MLB

KELLY M. O'GILVIE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Kelly M. O'Gilvie, plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Judgment Order entered in this action on the 5th day of January, 1994.

Respectfully submitted,

s/ Linda D. King
LINDA D. KING
Attorney-at-law
6135 E. Central
Wichita, KS 67208
(316) 686-2000

APPENDIX J — NOTICE OF APPEAL (UNITED STATES) FILED FEBRUARY 1, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Civil No. 90-1075-MLB

KELLY M. O'GILVIE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from that portion of the Judgment Order entered in this action on the 7th day of December, 1993 which grants the motion for reconsideration and for summary judgment filed by plaintiff.

Respectfully submitted,

RANDY RATHBURN
United States Attorney

Appendix J

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
U.S. Dep't of Justice
Tax Division
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489

APPENDIX K — COMPLAINT FILED JULY 9, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 92-1358-K

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE,

Defendants.

COMPLAINT

The United States of America, for its Complaint against defendants, alleges as follows:

1. This is a civil action brought by the United States of America pursuant to Section 7405 of the Internal Revenue Code (26 U.S.C.) ("the Code") to recover an erroneous income tax refund, plus interest, that was refunded to the defendant taxpayers Kevin M. O'Gilvie and Stephanie L. O'Gilvie for the taxable year 1988.

2. This action has been authorized and sanctioned by a delegate of the Secretary of the Treasury, and commenced at the direction of the Attorney General of the United States, pursuant to Section 7401 of the Code.

Appendix K

3. This Court has jurisdiction over this action pursuant to Code Section 7402(a) and 28 U.S.C. Sections 1340 and 1345.

4. Venue is proper in this judicial district under 28 U.S.C. Section 1396.

5. Defendant Kevin M. O'Gilvie resides in Benton, Kansas, within the federal judicial district of Kansas.

6. Defendant Stephanie L. O'Gilvie resides in Benton, Kansas, within the federal judicial district of Kansas.

7. Defendant Kevin M. O'Gilvie timely filed an individual federal income tax return for the tax year 1988 which reported as income $1,241,823.00 (one million, two hundred forty-one thousand, eight hundred twenty three dollars) received from the estate of Betty O'Gilvie.

8. Defendant Stephanie L. O'Gilvie timely filed an individual federal income tax return for the tax year 1988 which reported as income $1,241,823.00 (one million, two hundred forty-one thousand, eight hundred twenty three dollars) received from the estate of Betty O'Gilvie.

9. Defendant Kevin M. O'Gilvie on November 17, 1989 timely filed an amended individual federal income tax return for the tax year 1988 requesting a refund of $346,319 (three hundred forty-six thousand, three hundred nineteen dollars), plus interest.

10. Defendant Stephanie L. O'Gilvie on November 17, 1989 timely filed an amended individual federal income tax return for the tax year 1988 requesting a refund of $346,319

(three hundred forty-six thousand, three hundred nineteen dollars), plus interest.

11. On July 9, 1990, the Internal Revenue Service refunded to Kevin M. O'Gilvie the sum of $392,160.37 (three hundred ninety-two thousand, one hundred sixty dollars and thirty-seven cents), consisting of $346,319 (three hundred forty-six thousand, three hundred nineteen dollars) in tax and $45,841.37 (forty-five thousand, eight hundred forty-one dollars and thirty-seven cents).

12. On July 9, 1990, the Internal Revenue Service refunded to Stephanie L. O'Gilvie the sum of $392,160.37 (three hundred ninety-two thousand, one hundred sixty dollars and thirty-seven cents), consisting of $346,319 (three hundred forty-six thousand, three hundred nineteen dollars) in tax and $45,841.37 (forty-five thousand, eight hundred forty-one dollars and thirty-seven cents).

13. The Internal Revenue Service has determined that the refunds issued to Kevin M. O'Gilvie and Stephanie L. O'Gilvie and described in paragraphs 11 and 12 above were erroneous.

WHEREFORE, plaintiff, the United States of America, prays that this Court grant

(1) judgment in favor of the United States against Kevin M. O'Gilvie in the amount of $392,160.37, plus accrued interest as allowed by law;

(2) judgment in favor of the United States against Stephanie L. O'Gilvie in the amount of $392,160.37, plus accrued interest as allowed by law;

(3) such other and further relief as it deems just and proper, including the costs of this action.

REQUEST FOR PLACE OF TRIAL

The United States requests that trial of this matter be held in Wichita, Kansas.

LEE THOMPSON
United States Attorney

s/ Rachel D. Cramer
NOREENE C. STEHLIK
RACHEL D. CRAMER
Trial Attorneys
Tax Division
Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6540

APPENDIX L — ANSWER FILED SEPTEMBER 10, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 92-1358-MLB

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE,

Defendants.

ANSWER TO COMPLAINT

Defendants, pursuant to order of the court, answer the plaintiff's complaint as follows:

1. The defendants admit the allegations contained in paragraphs 1, 2 and 3 of plaintiff's complaint.

2. The defendants admit the allegations contained in paragraphs 4, 5 and 6 of plaintiff's complaint.

3. The defendants admit the allegations contained in paragraphs 7, 8, 9, 10, 11 and 12 of plaintiff's complaint.

4. The defendants deny the legal conclusion drawn by plaintiff contained in paragraph 13 of plaintiff's complaint.

Appendix L

Wherefore, defendants demand that plaintiff take nothing by its complaint.

s/ Linda D. King
LINDA D. KING
Attorney for Defendant 6135
E. Central
Wichita, Kansas 67208

CERTIFICATE OF SERVICE

IT IS hereby certified that on the 25th day of August, 1993 a true and correct copy of the above and foregoing **Answer to Complaint** was placed in the U.S. mail, postage prepaid, properly addressed to:

VIA FAX 202-514-6770
Noreene Stehlik
Tax Division
Office of Special Litigation
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044

Emily Metzger
1200 Epic Center
301 N. Main
Wichita, Kansas 67202

By s/ Linda D. King
LINDA D. KING #13004
Attorney for Defendants

APPENDIX M — ORDER FILED FEBRUARY 22, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Civil No. 92-1358-MLB

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE,

Defendants.

ORDER

IT IS HEREBY ORDERED AND ADJUDGED, pursuant to the Stipulation and Order filed August 20, 1993, in which the parties agreed to be bound by the final judgment of the district court in *Kelly O'Gilvie v. United States*, Civil No. 90-1075-B (D. Kan.) (subject to the provisions contained in paragraphs 13 and 14 of the Stipulation and Order which preserves the rights of the parties to appeal any adverse determination of the merits), that plaintiff, the United States of America, shall take nothing on its complaint against defendants Kevin M. O'Gilvie and Stephanie L. O'Gilvie, and that the action be dismissed on the merits.

Dated: February __, 1994.

s/ Monti L. Belot
THE HONORABLE MONTI L. BELOT
UNITED STATES DISTRICT JUDGE

Appendix M

Agreed as to form:

s/ Linda D. King
Linda King, Esquire
6135 East Central
P.O. Box 8085
Wichita, Kansas 67208
(316) 686-2000
Attorney for Defendants

s/ Noreene C. Stehlik
Noreene C. Stehlik
U.S. Department of Justice
Tax Division
P.O. Box 7238
Washington, D.C. 20044
(202) 514-6489
Attorney for United States

APPENDIX N — NOTICE OF APPEAL FILED MARCH 4, 1994

UNITED STATED DISTRICT COURT
DISTRICT OF KANSAS

Civil No. 92-1358-MLB

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order entered in this action on the 22d day of February, 1994, which holds that the United States of America shall take nothing on its complaint against defendants Kevin M. O'Gilvie And Stephanie L. O'Gilvie.

Appendix N

Respectfully submitted,

RANDY RATHBURN
United States Attorney

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
U.S. Dep't of Justice
Tax Division
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489

APPENDIX O — IRS LETTER DENYING REFUND DATED SEPTEMBER 16, 1991

Internal Revenue Service Department of the Treasury
District Director

Social Security or
Employer Identification Number:
514-70-2944
Kind of Tax:
Income
Document Locator Number:
N/A
Tax Period Ended:
December 31, 1988
Amount Claimed:
$955.852 [sic]
Date Claim Received:
March 12, 1991
Person to Contact:
M. Borst
Contact Telephone Number:
(316) 291-6409

Date: SEP 16 1991

Kelly M. Ogilvie
P.O. Box 8085
Wichita, KS 67208

CERTIFIED MAIL

Dear Taxpayer:

We are sorry, but we cannot allow your claim for an

Appendix O

adjustment to your tax, for the reasons stated below. This letter is your legal notice that your claim is fully disallowed.

If you wish to bring suit or proceedings for the recovery of any tax, penalties or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Claims Court. The law permits you to do this within 2 years from the mailing date of this letter. However, if you signed a waiver of the notice of disallowance (Form 2297), the period for bringing suit began to run on the date the waiver was filed.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

s/ Bruce R. Thomas
Bruce R. Thomas
District Director

Reasons for disallowance:

We are disallowing your claim as requested in the letter of John C. King dated February 12, 1991.

cc: Linda D. King

412 S. Main St.
Wichita, Kansas 67202

Letter 906 (DO) (Rev. 11-82)

APPENDIX P — LETTER FROM IRS TO KEVIN O'GILVIE PROPOSING TO JOINT COMMITTEE APPROVAL OF 1988 TAX RETURNS DATED MAY 2, 1990

Internal Revenue Service **Department of the Treasury**

412 S. Main St.
Wichita, Kansas 67202

Kevin M. Ogilive, Minor
% R. Pitts First National Bank
P.O. Box 1
Wichita, Kansas 67201-5000

Person to Contact:
Gail C. Woodberry
Telephone Number:
(316) 291-6603
Refer Reply to:
E:ESP:GCW:Stop 4300-WIC J/C
Date: May 2, 1990

Tax Periods: December 31, 1988

Gentlemen:

The Internal Revenue Service has proposed to the Joint Committee on Taxation that your income tax returns or amended returns, or application for tentative allowance for the above periods be accepted as filed or as previously adjusted by tentative allowances, as appropriate. As the action propose by the Service is subject to approval by the Joint Committee, this letter does not constitute an "accepted without examination" notification.

We will let you know when the Joint Committee has completed its consideration of your case. If you have any questions, please contact the person whose name and telephone number are shown above.

Appendix P

Sincerely,

s/ Bruce R. Thomas
Bruce R. Thomas
District Director

s/ Cindy Zimmerman
by Cindy Zimmerman
Chief, Examination Support and Processing Branch

APPENDIX Q — LETTER FROM IRS TO CHAIRMAN OF JOINT COMMITTEE APPROVING REFUND DATED APRIL 13, 1990

Internal Revenue Service Department of the Treasury

District Director
1100 Commerce St.,
Dallas, Texas 75242

Date: APR 13 1990

DAL:E:SM
Examination — Dallas
Susan Monroe FTS 729-1482

EXPEDITE REFUND REQUEST REPORT

The Chairman
Joint Committee on Taxation
1015 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

In accordance with the provisions of section 6405 of the Internal Revenue Code of 1986, there are reported the following refunds or credits of income tax for which a supplemental report is not required to be submitted.

Appendix Q

2. Kevin M. O'Gilvie Year: 8812
Wichita, Kansas (TCH)
Related Cases: Stephanie L. O'Gilvie

Refunds or Credits

Section 6405(a)	$346,319
Section 6405(b)	-0-
Total	$346,319

Survey activity: full

The taxpayer filed an amended return to remove punitive damages included in taxable income on his original return. The punitive damages were received for pain and suffering and the wrongful death of his mother.

The above overassessments are approved.

Sincerely,

s/ Gary O. Booth
Gary O. Booth
District Director

APPENDIX R — LETTER FROM JOINT COMMITTEE TO HONORABLE FRED T. GOLDBERG, COMMISSIONER OF INTERNAL REVENUE DATED MAY 3, 1990

CONGRESS OF THE UNITED STATES
JOINT COMMITTEE ON TAXATION
1015 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6453
(202) 225-3621

MAY -3 1990

Honorable Fred T. Goldberg
Commissioner of Internal Revenue
Washington, D.C. 20224

Attention: Quality Section — EX:Q:Q

Dear Mr. Goldberg:

Receipt is hereby acknowledged of reports submitted pursuant to the provisions of section 6405 of the Internal Revenue Code of 1986, by the Internal Revenue Service regarding refunds in favor of the following taxpayers:

Kevin M. O'Gilvie, Wichita, Kansas

Members of the Committee staff have examined these reports, which were submitted in abbreviated form. They have reported to me that the reports disclose no basis for recommending reconsideration by the Internal Revenue Service of any of the matters contained therein. It is my opinion, therefore, that having complied with the intent of section 6405,

Appendix R

you should proceed with the disposition of these cases as proposed in the reports submitted.

Sincerely yours,

s/ Mary M. Schmitt
Mary M. Schmitt

APPENDIX S — LETTER FROM IRS TO KEVIN O'GILVIE ALLOWING REFUND DATED JUNE 6, 1990

Internal Revenue Service **Department of the Treasury**

412 S. Main St.
Wichita, Kansas 67202

Kevin M. O'Gilvie, Minor
c/o R. Pitts, First National Bank
Wichita, Kansas 67201-5000

Person to Contact:
Stephen J. Glotzbach
Telephone Number:
(316) 291-6570
Refer Reply to:
E:QAS:SG:Stop 4020-WIC
Date: JUN 6, 1990

Tax Periods: Tax Year Ending 12-31-88

Dear Mr. O'Gilvie:

The Joint Committee on Taxation has taken no exception to the conclusions the Internal Revenue Service reached regarding your income tax returns for the above periods.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely,

s/ Bruce R. Thomas
Bruce R. Thomas
District Director

s/ Carol A. Ebel
by Carol A. Ebel
Chief, Quality Review Staff

TOTAL $ .. 45 420.0

:101000291: ⑈ 02 8298 7 ⑈ ⑈000184200

United States Treasury 1541/000 A 211,303,615

Check No.

07 06 90 3 AUSTIN, TEXAS 2216 34463738

509-86-8895 I2 8Q E OGIL AUSTIN 48 TAX REF

Pay to the order of

STEPHANIE L OGILVIE MINOR
R PITTS 1ST NATIONAL BANK
PO BOX 1
WICHITA KS 67201

38 12/88

$*392160*37

VOID AFTER ONE YEAR

INT 45841.37

⑈22165⑈ :000000518: 34463738⑈ 040790 ⑈00392160377

United States Treasury 1541/000 A 211,303,616

Check No.

07 06 90 63 AUSTIN, TEXAS 2216 34463739

509-86-8943 I2 8Q E OGIL AUSTIN 48 TAX REF

Pay to the order of

KEVIN M OGILVIE MINOR
X R PITTS FIRST NATIONAL BANK
PO BOX 1
WICHITA KS 67201

39 12/88

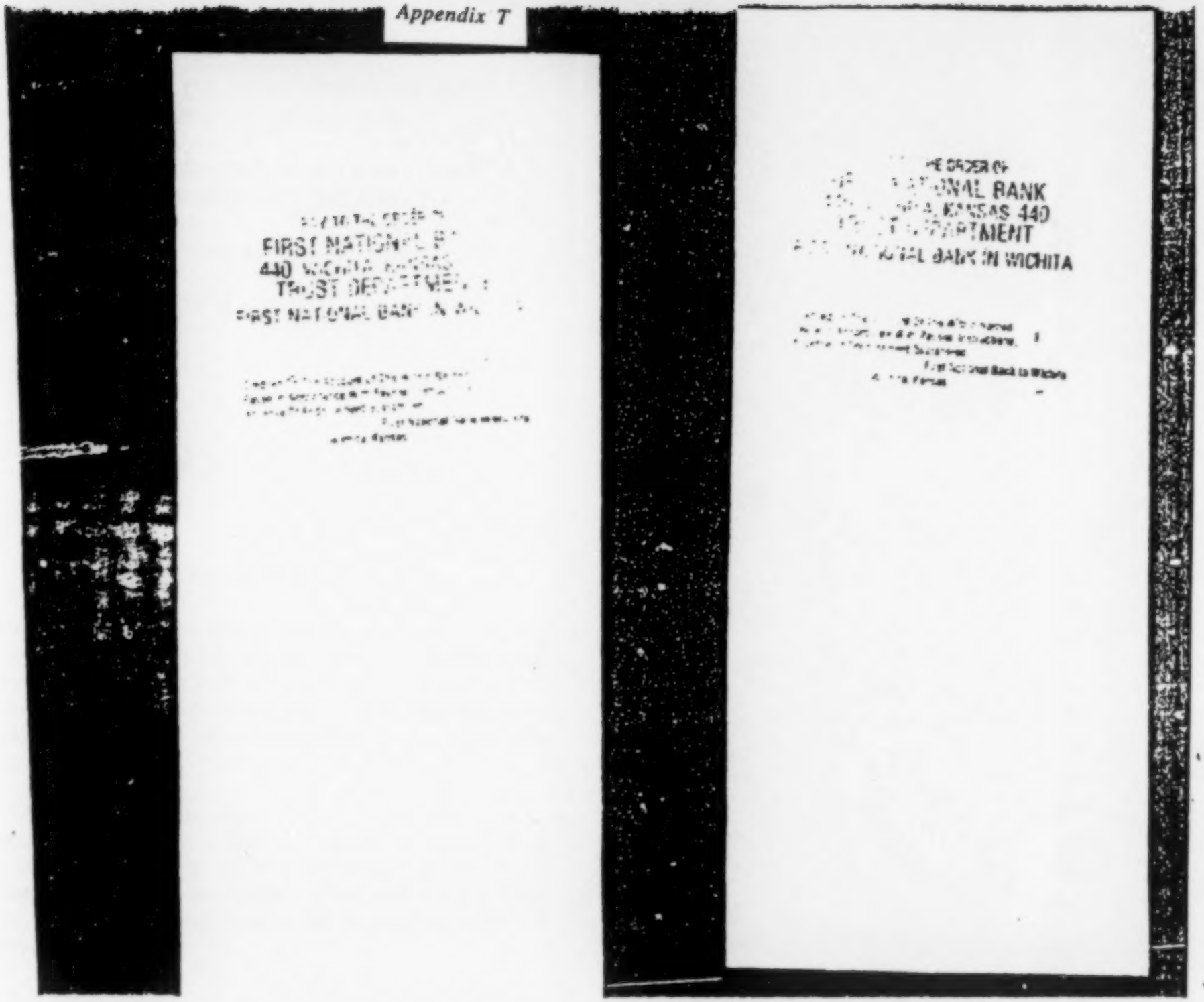
$*392160*37

VOID AFTER ONE YEAR

INT 45841.37

⑈22165⑈ :000000518: 34463739⑈ 040790 ⑈00392160377

Appendix T


FIRST NATIONAL BANK
TRUST DEPARTMENT
FIRST NATIONAL BANK IN WICHITA

APPENDIX U — SUPERSEDEAS BOND FILED JANUARY 15, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 83-1846

KELLY M. O'Gilvie, et al.,

Plaintiffs,

vs.

INTERNATIONAL PLAYTEX, INC.

Defendant.

SUPERSEDEAS BOND

WHEREAS, in the above-entitled court and cause, a judgment was rendered on the 26th day of February, 1985, in the amount of $11,225,000, with interest thereon at the rate of 9.17 percent per annum from the date of judgment; for which payment well and truly to be made, International Playtex, Inc. is bound by this instrument; and

WHEREAS, International Playtex, Inc. intends to prosecute proceedings to reverse, vacate, or modify said judgment, and International Playtex, Inc. has been granted a stay of execution by statute until midnight March 8, 1985, or until Supersedeas Bond is filed pending the final determination of said appeal.

Appendix U

NOW, THEREFORE, International Playtex, Inc., as principal and as surety, hereby undertakes to Kelly M. O'Gilvie in the penal sum of $12,725,000, as required by the Court, that International Playtex, Inc. will pay the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award.

The condition of this obligation is that if International Playtex, Inc., defendant, shall prosecute its post-trial motions to disposition and shall satisfy or supersede, or cause to be superseded, any judgment in full, together with costs, interest and damages for delay if the defendant's post-trial motions are denied, this obligation shall be void; otherwise, it shall remain in full force and effect.

International Playtex, Inc. hereby submits to the jurisdiction of the United States District Court for the District of Kansas and irrevocably appoints the Clerk thereof as its agent upon whom any papers affecting the liability on this obligation may be served.

INTERNATIONAL PLAYTEX, INC.

By s/ Hercules P. Sotos
Hercules P. Sotos, President
Principal and "Surety"

Appendix U

ATTEST:

By s/ Melvin L. Ortner
Assistant Secretary

APPROVED:

s/ Patrick F. Kelly
Patrick F. Kelly
U.S. District Judge

DATED: 1-15-88

5 4

Nos. 95-966, 95-977

Supreme Court, U.S.
FILED
MAY 5 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE, minors,

Petitioners,

-and-

KELLY M. O'GILVIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE, MINORS

ROBERT M. HUGHES
Counsel of Record
JACK D. FLESHER
GREGORY L. FRANKEN
DAVID B. SUTTON
BEVER, DYE, MUSTARD
& BELIN, L.C.
Attorneys for Petitioners
Kevin M. O'Gilvie and
Stephanie L. O'Gilvie, minors
106 West Douglas, Suite 700
Wichita, Kansas 67202
(316) 263-8294

STEPHEN R. McALLISTER
Of Counsel
University of Kansas School of Law
Green Hall
Lawrence, Kansas 66045
(913) 864-4550

8702-A
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

64 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether a punitive damages award received by minor children for the wrongful death of their mother in a personal injury lawsuit is excludable from gross income as "any damages received . . . on account of personal injuries . . ." under 26 U.S.C. § 104(a)(2)?

II. Whether the event which commences the two year statute of limitations under 26 U.S.C. § 6532(b), for a suit by the United States to recover a refund erroneously made, should be the issuance or mailing of the refund check by the government or its receipt by the taxpayer?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Kevin M. O'Gilvie and Stephanie L. O'Gilvie, minors by and through INTRUST Bank, NA (formerly The First National Bank in Wichita), Conservator.

RULE 29.6 LISTING

Petitioners' Conservator, INTRUST Bank, NA is a wholly owned subsidiary of INTRUST Financial Corp., formerly First Bancorp of Kansas, Inc.

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3. The lower courts largely have ignored the history of § 104(a)(2). 19

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Rev. Rul. 80-211, 1980-2 C.B. 57 24

Rev. Rul. 84-108, 1984-2 C.B. 32 ..... 10, 29, 30, 34

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OPINIONS BELOW

Kelly M. O'Gilvie v. United States, 66 F.3d 1550 (10th Cir. 1995), is reproduced in Pet. App. 1a-22a;[1] *Kelly M. O'Gilvie v. United States*, No. 90-1075-B Civ. (D. Kan. Aug. 26, 1992), 92-2 USTC ¶ 50,567, (Pet. App. 25a-27a) is unofficially reported at 92-2 USTC ¶ 50,567; and *Kelly M. O'Gilvie v. United States*, No. 90-1075-B Civ. (D. Kan. May 26, 1992), (Pet. App. 28a-36a) is unofficially reported at 92-2 USTC ¶ 50,344.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 19, 1995. The petition for a writ of certiorari was filed on December 18, 1995, and was granted on March 25, 1996. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

The United States filed a complaint in the United States District Court for the District of Kansas, seeking to recover federal income tax refunds that had been paid to INTRUST Bank, NA, as Conservator of Kevin M. O'Gilvie and Stephanie L. O'Gilvie. The district court had jurisdiction under 28 U.S.C. § 1345.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 61(a) of the Internal Revenue Code of 1986, 26 U.S.C. § 61(a),[2] provides in relevant part:

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1. References to Pet. App. in this Brief are to the Appendix in the Petition for a Writ of Certiorari, Case No. 95-966.

2. Unless otherwise stated, all Section references are to the Internal Revenue Code, Title 26, United States Code, as in effect for the taxable year at issue.

> GENERAL DEFINITION — Except as otherwise provided in this subtitle, gross income means all income from whatever source derived . . .

2. Section 104(a) of the Internal Revenue Code of 1986, 26 U.S.C. § 104(a), provides in relevant part:

> IN GENERAL — Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include —
>
> * * *
>
> (2) The amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness.

3. Section 6532(b) of the Internal Revenue Code of 1986, 26 U.S.C. § 6532(b), provides:

> SUITS BY UNITED STATES FOR RECOVERY OF ERRONEOUS REFUND — Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund, except that such suit may be brought at any time within 5 years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.

4. Section 7405 of the Internal Revenue Code of 1986, 26 U.S.C. § 7405, provides in relevant part:

> (a) REFUNDS AFTER LIMITATION PERIOD —Any portion of a tax imposed by this title, refund of which is erroneously made, within the meaning of section 6514, may be recovered by civil action brought in the name of the United States.
>
> (b) REFUNDS OTHERWISE ERRONEOUS — Any portion of a tax imposed by this title which has been erroneously refunded (if such refund would not be considered as erroneous under section 6514) may be recovered by civil action brought in the name of the United States.
>
> * * *
>
> (d) PERIODS OF LIMITATION —
>
> For periods of limitations on actions under this section, see section 6532(b).

STATEMENT OF THE CASE

A. Factual Background

The Petitioners in this case are Kevin M. O'Gilvie and Stephanie L. O'Gilvie (sometimes hereinafter referred to as "the O'Gilvie children"). The O'Gilvie children are the minor children of Betty O'Gilvie, who died April 2, 1983, of toxic shock syndrome (Pet. App. 3a, 28a). INTRUST Bank, NA is the conservator for each of the O'Gilvie children. Kelly M.

O'Gilvie, the husband of Betty O'Gilvie, acting as administrator of her estate and as guardian of the O'Gilvie children brought a successful product liability suit against International Playtex, Inc., the manufacturer of the tampons Betty O'Gilvie used (Pet. App. 3a). Following a trial, a jury awarded actual damages of $1,525,000 and punitive damages of $10,000,000. *See O'Gilvie v. International Playtex, Inc.*, 609 F. Supp. 817, 818 (D. Kan. 1985), *aff'd in part and rev'd in part*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). The district court ordered a remittitur of the punitive award to $1,350,000, 609 F. Supp. at 819-820, but the Tenth Circuit ordered reinstatement of the full punitive award, 821 F.2d at 1448-1449.

In 1988, the Estate of Betty O'Gilvie received the proceeds of the punitive damages award, totaling, net of attorney's fees and expenses, $4,967,292 (Pet. App. 3a). Kevin and Stephanie each received one-fourth (1/4) of the net proceeds, or $1,241,823 each. (Pet. App. 3a). The conservator, on behalf of the O'Gilvie children, reported and paid tax on their shares of the punitive damages on their individual federal income tax returns for 1988, the year the funds were distributed by the estate to the conservator.

In August 1989, Kelly O'Gilvie filed a claim for refund with respect to his 1988 income taxes, asserting that punitive damages were excluded from his gross income under § 104(a)(2) as damages received "on account of personal injury." When the Internal Revenue Service (hereinafter "IRS") took no action on his refund claim he filed suit against the United States to recover the refund plus interest (App. 22a). The parties filed cross-motions for summary judgment, each asserting there was no genuine issue of material fact and that the taxability of punitive damages could be decided as a matter of law (Pet. App. 4a).

In November 1989, the O'Gilvie children each filed a claim for refund on the ground that the punitive damages award was

excluded from gross income under § 104(a)(2) as damages received "on account of personal injury" (Pet. App. 4a). On April 13, 1990, the IRS, by letter to the Joint Committee on Taxation, requested that a refund be made to the O'Gilvie children (App. 74a). On May 3, 1990, the Joint Committee on Taxation approved the requested refunds to the O'Gilvie children (App. 76a). The IRS informed the children of the Joint Committee on Taxation's decision on June 6, 1990 (App. 78a). On July 9, 1990, the conservator received in the mail, from the United States Treasury, two checks, each in the amount of $392,160.37, representing the federal income tax refund claimed by each of the O'Gilvie children, plus interest (App. 79a). Each check bears an issue date of July 6, 1990 (App. 79a).

On July 9, 1992, the IRS filed its complaint herein against the O'Gilvie children, seeking under § 7405 to recover as erroneously made the refunds that had been paid to them, asserting that the punitive damages award was taxable (App. 60a). On August 20, 1993, in accordance with an agreement entered into by INTRUST Bank, NA, as conservator of the O'Gilvie children, and the United States, the district court entered a Stipulation and Order (Pet. App. 37a-40a), paragraphs 10 and 14 of which provide as follows:

> 10. The legal issues in this case are identical to the legal issues in the case of *Kelly O'Gilvie v. United States*, Civil No. 90-1075-B (D. Kan.), and the parties to this litigation therefore agree to be bound by the final judgment of the district court in *Kelly O'Gilvie v. United States*, Civil No. 90-1075-B (D. Kan.) (subject to the provisions contained in paragraphs 13 and 14 below).
>
> * * *

> 14. Both parties reserve the right to appeal any adverse determination on the merits in this case.

(Pet. App. 39a).

B. Proceedings Below

On May 26, 1992, the district court ruled (Pet. App. 25a-27a), that the punitive damages Kelly O'Gilvie received were taxable. However, on that same day this Court issued its opinion in *United States v. Burke*, 504 U.S. 229 (1992). In view of the *Burke* decision, Kelly O'Gilvie moved for reconsideration of the decision against him (Pet. App. 25a). On August 26, 1992, the district court granted Kelly O'Gilvie's motion and reversed its May 26, 1992, decision, holding that punitive damages are excludable from gross income under § 104(a)(2) (Pet. App. 28a). The district court granted summary judgment for Kelly O'Gilvie, and, pursuant to the Stipulation and Order (Pet. App. 37a), also granted summary judgment to the O'Gilvie children on the punitive damages issue.

The United States appealed the district court decision (App. 68a), and the Court of Appeals for the Tenth Circuit reversed. The Tenth Circuit addressed the question whether § 104(a)(2) excludes a punitive damages award in a personal injury action. The court noted that four other circuits have determined that punitive damages in personal injury cases are not excludable under § 104(a)(2) (Pet. App. 13a, citing *Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994); *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990)). The court observed (Pet. App. 14a-16a) that one circuit had held to the contrary (*Horton v. Commissioner*, 33 F.3d 625, 630 (6th Cir. 1994)), basing its

conclusion on this Court's decision in *United States v. Burke*, 504 U.S. 229 (1992).

The Tenth Circuit observed that the issue in *Burke* was whether a claim under Title VII of the Civil Rights Act of 1964 redressed "a personal injury" within the meaning of § 104(a)(2). This Court in *Burke* stated that as to what constitutes "a personal injury" the statute was ambiguous and the legislative history was not instructive. Therefore, this Court relied on the regulation relating to the statute, which defined "damages" as "an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights." Treas. Reg. § 1.104-1(c) (1958). This Court noted that under traditional tort law, a variety of remedies are available, including pain and suffering, emotional distress, harm to reputation, and punitive damages. Because Title VII does not provide these types of remedies, this Court concluded that a Title VII claim was not a tort type of personal injury claim (Pet. App. 14a-15a).

The Tenth Circuit then noted that this Court in *Commissioner v. Schleier*, 515 U.S. __, 115 S. Ct. 2159 (1995), addressed whether ADEA liquidated damages are excludable under § 104(a)(2) and held that they are not (Pet. App. 15a). This Court in *Schleier* stated that neither the recovery of back wages nor liquidated damages under ADEA are "on account of" personal injury. 515 U.S. at __, 115 S. Ct. at 2164-2165. This Court noted the requirement in Treas. Reg. § 1.104-1(c) that the recovery "be received in a tort type action is not a substitute for the statutory requirement that the amount be received 'on account of personal injuries or sickness'; it is an additional requirement." 515 U.S. at __, 115 S. Ct. at 2166. This Court then concluded that:

> the plain language of § 104(a)(2), the text of the applicable regulation, and our decision in *Burke* establish two independent

> requirements that a taxpayer must meet before a recovery may be excluded under § 104(a)(2). First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is "based upon tort or tort type rights" and second, the taxpayer must show that the damages were received "on account of personal injuries or sickness."

(Pet. App. 16a, quoting 515 U.S. at __, 115 S. Ct. at 2167).

In neither *Burke* nor *Schleier* did this Court have occasion to address whether the phrase "on account of" personal injuries in § 104(a)(2) is ambiguous (Pet. App. 16a). The Tenth Circuit, however, noted that the statutory requirement that damages be received "on account of" personal injuries is subject to more than one interpretation: It could be read to refer broadly to any award received in a personal injury suit; or it could be read more narrowly to refer only to damages awarded "on account of" the injury itself and not to damages awarded "on account of" the nature of the conduct of the defendant (Pet. App. 17a, quoting *Reese v. United States*, 24 F.3d at 230-231). Finding nothing in the history of the statute that made clear whether Congress intended to exclude punitive damages from income under § 104(a)(2), the Tenth Circuit applied what it characterized as the "default rule" that exclusions from income are to be narrowly construed. Thus, the Tenth Circuit held that punitive damages are not excludable from income under § 104(a)(2) (Pet. App. 22a, citing *United States v. Burke*, 504 U.S. at 248 (Souter, J. concurring)).

The Tenth Circuit also held that the government's suit for recovery of the children's refunds was timely, on the basis that the filing of the complaint on July 9, 1992, was within two years of the children's receipt of the refund checks in the mail on July

9, 1990 (Pet. App. 10a). To the children's argument that the date of mailing of the refund checks is the date which commences the running of the two year limitation period under § 6532(b), the court replied that a statute of limitation generally does not begin to run "until a suit could be brought" and assumed that an action does not lie at least until the taxpayer receives the refund check because until that point the government could still stop payment on the check (Pet. App. 9a-10a).

SUMMARY OF ARGUMENT

The language of § 104(a)(2) excludes "*any* damages received . . . on account of personal injuries or sickness" from taxable income (emphasis added). The statutory language draws no distinction between the taxability of compensatory and punitive damages. Indeed, a plain and common sense reading of the statute indicates that the damages the O'Gilvie children received in this case were "on account of personal injuries or sickness." But for the personal injuries the O'Gilvie children's mother sustained, neither compensatory nor punitive damages would have been awarded in this case. Thus, the punitive, as well as the compensatory, damages were received on account of personal injuries.

The language of § 104(a) is substantially unchanged from that originally enacted as § 213(b)(6) of the Revenue Act of 1918, Pub. L. No. 65-254, 40 Stat. 1057, 1066 (1919). The codifications of the Internal Revenue Code in 1939 and 1954 did not alter any of the substantive language from the original enactment. The codifications merely restructured the original language into separate clauses and added headings to the sections.

The plain language of the original provision demonstrates that Congress intended to exclude punitive damages from taxable income in the circumstances presented here. Congress

expressly distinguished between amounts received through accident or health insurance or workmen's compensation acts on the one hand and amounts received by suit or agreement on account of personal injuries on the other hand. As to the former, Congress excluded only amounts received "as compensation for personal injuries." But as to the latter, Congress excluded "any damages" so received. This significant distinction in the original statutory language demonstrates congressional intent that punitive, as well as compensatory, damages received by suit or agreement on account of personal injuries be excluded from taxable income. Although some courts considering the exclusion of punitive damages under § 104(a)(2) have found the section to be ambiguous, none of them, including the Tenth Circuit below, have addressed or analyzed Congress' intent evidenced in the original statutory language and the critical distinction made in that language. In violation of principles of sound statutory construction, these courts resort to less reliable aids of construction.

Further, the IRS in Rev. Rul. 75-45, 1975-1 C.B. 47, interpreted the language in § 104(a)(2) as providing that "any damages, whether compensatory or punitive, received on account of personal injuries or sickness are excludable from gross income." *Id.* However, in Rev. Rul. 84-108, 1984-2 C.B. 18, the IRS reversed its position, relying on *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), which did not address personal injuries as in the present case. Adherence to Rev. Rul. 84-108 will not create uniformity in taxation of damage awards, but rather result in an individual being subject to federal tax, or not, depending on how the laws of his state of residence characterize the award.

The 1989 amendment to § 104(a)(2) further evidences congressional intent that punitive damages be excluded from taxable gross income. The amendment provided that § 104(a)(2)

"shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641, 103 Stat. 2106, 2379 (1989).[3] The clear and *only* reasonable implication from the 1989 amendment is that, at least in cases involving physical injury, punitive damages received in lawsuits filed prior to its effective date of July 10, 1989, are not taxable. Any other interpretation renders the 1989 amendment meaningless.

The date of the "making" of a tax refund by check should be either the date the check is issued or mailed by the government. The plain implication of the words used in § 6532(b) is that the event which triggers the limitation period ("making" the refund) is an event which requires the participation of the government only, not the taxpayer. Thus, the occurrence of the taxpayer's receipt — which depends on many variables such as the speed of mail delivery, the distance between the taxpayer and the IRS, and whether delivery would ordinarily fall on a holiday or Sunday — is irrelevant under the statute. In *United States v. Wurts*, 303 U.S. 414 (1938), this Court held that "making," as used in the predecessor to § 6532(b), means "paying," but the Court did not decide whether "paying" means mailing or receiving. *Id.* at 418. For the sake of simplicity and certainty in the administration of tax law, the expiration of the statute of limitations should be determinable by reference to a date which is readily available to both the government and the taxpayer. That date is the date the government either issues or mails the refund check.

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3. The amended statute does not apply here since the underlying lawsuit was filed, and the damages were received, by the O'Gilvie children before the July 10, 1989, effective date of the amendment.

ARGUMENT

I.

SECTION 104(a)(2) EXCLUDES A PUNITIVE DAMAGES AWARD RECEIVED IN A PERSONAL INJURY LAWSUIT FROM TAXABLE INCOME

A. Introduction

The first step in calculating taxable income under the Internal Revenue Code is to determine the taxpayer's "gross income." "'Except as otherwise provided in this subtitle, gross income means all income from whatever source derived.' 26 U.S.C. § 61(a)." *Commissioner v. Schleier*, 515 U.S. __, 115 S. Ct. 2159, 2163 (1995).

Petitioners recognize that "Congress intended through § 61(a) and its statutory precursors to exert 'the full measure of its taxing power,' *Helvering v. Clifford*, 309 U.S. 331, 334, 60 S. Ct. 554, 556, 84 L. Ed. 788 (1940), and to bring within the definition of income any 'accessio[n] to wealth.' *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431, 75 S. Ct. 473, 477, 99 L. Ed. 483 (1955)." *Burke*, 504 U.S. at 233.

This Court has also noted a "corollary to § 61(a)'s broad construction, namely the 'default rule of statutory interpretation that exclusions from income must be narrowly construed.' *United States v. Burke*, 504 U.S., at 248, 112 S. Ct., at 1878 (Souter, J., concurring in judgment); see *United States v. Centennial Savings Bank FSB*, 499 U.S. 573, 583, 111 S. Ct. 1512, 1519, 113 L. Ed.2d 608 (1991); *Commissioner v. Jacobson*, 336 U.S. 28, 49, 69 S. Ct. 358, 369, 93 L. Ed., 477 (1949); *United States v. Burke*, 504 U.S., at 244, 112 S. Ct., at 1875-1876 (Scalia, J., concurring in judgment)." *Schleier*, 515 U.S. at __, 115 S. Ct. at 2163.

Against this backdrop, however, § 104(a)(2) clearly and on its face excludes from taxable income the damages at issue in this case. Section 104(a)(2) provides that gross income does not include "the amount of *any damages* received . . . on account of personal injuries or sickness" (emphasis added). In an *en banc* decision, the Tax Court, in *Miller v. Commissioner*, 93 T.C. 330, 338 (1989) (15 to 2 decision), *rev'd*, 914 F.2d 586 (4th Cir. 1990), stated "we read 'any damages' to mean 'all' damages, including punitive damages." *Horton v. Commissioner*, 100 T.C. 93, 95 (1993) (16 to 3 decision expressly rejecting the reasoning and holding of the Fourth Circuit's reversal in *Miller*), *aff'd*, 33 F.3d 625 (6th Cir. 1994). Further, as set forth in this Brief, the plain language of the statute; the statute's history; the IRS' own revenue rulings, as well as Tax Court decisions; and Congress' 1989 amendment to § 104 to provide that the provision's exclusion "shall not apply to any punitive damages in connection with a case not involving physical injury or sickness," Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239 § 7641, 103 Stat. 2106, 2379 (1989), all lead to the inexorable conclusion that the punitive damages received in this case were received "on account of personal injuries" and, therefore, excluded under § 104(a)(2).

B. By Excluding "Any Damages Received . . . On Account Of Personal Injuries Or Sickness," § 104(a)(2) On Its Face Excludes Punitive Damages Received In A Personal Injury Action

Section 104 of the Internal Revenue Code provides certain specific exclusions from the definition of gross income provided by § 61(a). Section 104(a)(2) provides, in relevant part: "[G]ross income does not include — . . . (2) the amount of any damages received . . . on account of personal injuries or sickness." It is undeniable that the damages the O'Gilvie children received through the action against International

Playtex, Inc. are damages received "on account of personal injuries or sickness." The damages were awarded on account of the death of their mother Betty O'Gilvie by toxic shock syndrome caused by International Playtex's tampon product (Pet. App. 3a).

The language of § 104(a)(2) states that *any* damages received on account of personal injuries or sickness are excluded from gross income and, thus, taxation. The starting place in the construction of any statute is with the language of the statute itself. *See Ankenbrandt v. Richards*, 504 U.S. 689, 707 (1992); *Community v. Reid*, 490 U.S. 730, 739 (1989); *Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989); *Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). It is a cardinal rule of statutory construction that "the words of statutes — including revenue acts — should be interpreted where possible in their ordinary, everyday senses." *Crane v. Commissioner*, 331 U.S. 1, 6 (1947).

An ordinary, everyday meaning of "any damages" would be "all damages." *See* Merriam Webster's Collegiate Dictionary 53 (10th ed. 1993) (providing a definition of the term "any" as including "every" or "all"); Black's Law Dictionary 86 (5th ed. 1979) ("The word any has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject matter of the statute.") Such a meaning encompasses punitive damages.

All the damages received by the O'Gilvie children, whether compensatory or punitive, were received "on account of" the personal injuries relating to the death of their mother. "On account of" is defined to mean "for the sake of," "by reason of," or "because of." Websters Third New International Dictionary (1981). The Tax Court in *Miller*, 93 T.C. at 339, noted "[t]hese

phrases suggest causation." But for the personal injuries sustained, the O'Gilvie children would not have recovered any damages, whether compensatory or punitive. Sustaining personal injuries is directly and causally connected to the recovery of any damages. A finding of actual compensatory damages is generally necessary to support an award of punitive damages.[4] The statutory language of § 104(a)(2) does not distinguish between compensatory and punitive damages regarding exclusion from taxation. *Any* damages received on account of personal injuries are excluded by § 104(a)(2).

The Sixth Circuit addressed the scope of § 104(a)(2) in *Horton v. Commissioner*, 33 F.3d 625 (6th Cir. 1994). Relying on this Court's opinion in *Burke*, the Sixth Circuit found the taxpayers' damages — both compensatory and punitive — were received "on account of" their personal injuries. Indeed, the court declared that the "plain meaning of the broad statutory language [of § 104(a)(2)] simply does not permit a distinction between punitive and compensatory damages." 33 F.3d at 631. The statutory language of § 104(a)(2), used in its ordinary, everyday sense, does not draw a distinction between punitive and compensatory damages.

C. The History Of § 104 Conclusively Demonstrates That The Punitive Damages Award In This Case Is Excludible From Gross Income

1. The language of § 104 is substantially unchanged from the language Congress originally enacted.

The relevant language of § 104(a)(2) is substantially unchanged from its original predecessor language enacted as

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4. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts 14 (5th ed. 1984).

part of the Revenue Act of 1918, Pub. L. No. 65-254, 40 Stat. 1057, 1066 (1919). In relevant part, Section 213(b)(6) of the Revenue Act of 1918 provided:

> Sec. 213. That for the purposes of this title . . . the term "gross income" . . . —
>
> (b) Does not include the following items, which shall be exempt from taxation under this title: . . .
>
> (6) Amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of *any* damages received whether by suit or agreement on account of such injuries or sickness.

40 Stat. at 1066 (emphasis added).

At the time of the Revenue Act of 1918, the definition of gross income was set forth in the preceding subsection, § 213(a). With the codification of the Internal Revenue Code in 1939 the definition of gross income became § 22(a) with the heading "General Definition." Section 22(b) of the 1939 Code enumerated the "Exclusions from Gross Income." Section 213(b)(6) then became, without change to the text, § 22(b)(5):

> Compensation for Injuries or Sickness. — Amounts received through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness.

26 U.S.C. § 22(b)(5) (1939). The 1939 Code only added a heading to subsection (b)(5).

The Internal Revenue Code was recodified in 1954. The 1954 Code restructured the sections pertaining to gross income and exclusions, but did not substantially alter any of the relevant language concerning "any damages received . . . on account of" personal injuries. Under the 1954 Code the definition of gross income became § 61. The various exclusions from gross income were grouped together as "Part III — Items Specifically Excluded from Gross Income." Section 22(b)(5) of the 1939 Code became § 104 under the 1954 Code and retained the same heading "Compensation for Injuries or Sickness" which the 1939 Code had added. While the 1939 Code had addressed amounts received through accident or health insurance, workmen's compensation acts and any damages received on account of personal injuries in a single sentence, the 1954 Code restructured this sentence into three separate, but substantively unrevised clauses. Section 104(a) of the 1954 Code, as originally enacted, provided in relevant part as follows:

> [G]ross income does not include —
>
> (1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;
>
> (2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness;
>
> (3) amounts received through accident or health insurance for personal injuries or sickness . . . .

26 U.S.C. § 104(a) (1954). The critical language of § 104(a) remains unchanged to the present day.

2. The history of § 104(a)(2) demonstrates that Congress intended to exclude punitive damages received in personal injury suits from taxation.

The statutory language of the predecessor to § 104(a)(2), § 213 (b)(6) of the Revenue Act of 1918, demonstrates on its face that Congress intended to exclude punitive damages, as well as compensatory damages, received by suit or agreement on account of personal injuries. In the first clause for amounts received through accident or health insurance or under workmen's compensation acts, only amounts received "as compensation for personal injuries or sickness" were excluded. The second clause, for amounts received by suit or agreement, excluded "any" damages — not just compensatory damages — received on account of personal injuries or sickness.

At the time Congress enacted the Revenue Act of 1918, the availability of punitive damages had long been established.[5] Congress, aware of punitive damages,[6] could have in the second clause excluded only damages received "as compensation for"

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5. *See Day v. Woodworth*, 54 U.S. 363, 371 (1851) ("It is a well established principle of the common law that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant. . . . "); Note, "Exemplary Damages in the Law of Torts", 70 Harv. L. Rev. 517, 518-520 (1957) (punitive damages have been a part of the English common law since the thirteenth century). *See also Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274 n.19 (1989) (noting that punitive damages existed when the Bill of Rights was drafted).

6. *See Thompson v. Thompson*, 218 U.S. 611 (1910) (wherein this Court presumed the legislature to know the state of the common law).

personal injuries as it did in the first clause, or it could have excluded only "compensatory damages" in the second clause. It did neither. *See Miller v. Commissioner*, 93 T.C. at 338. Having restricted excludable damages to those received as compensation for personal injuries from accident or health insurance or under workmen's compensation acts, Congress did not place the same restriction on damages received by suit or agreement for personal injuries. Instead, Congress expressly excluded *any* damages received on account of personal injuries.

This distinction in the original statutory language cannot be assumed to be irrelevant or inadvertent. By focusing on compensatory amounts in the first clause, but not in the second clause, the original statutory language signified that any damages received by suit or agreement on account of personal injuries, whether compensatory or punitive, share a common basis for exclusion from taxation. Such a common basis supports a "but-for" definition of the "on account of" requirement. Thus, personal injuries are the essential prerequisite to excluding damages, whether compensatory or punitive, from taxable income. But for the personal injuries their mother sustained, the O'Gilvie children would not have received compensatory or punitive damages. Section 104(a)(2), both in its current form and as originally enacted in 1918, does not support a distinction between the taxation of compensatory damages and punitive damages received in personal injury suits.

3. The lower courts largely have ignored the history of § 104(a)(2).

The primary duty of courts in construing statutory language is to discern congressional intent as to the meaning of the language. *See, e.g., United States v. N.E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 53 (1942). Where ambiguous, the meaning of the statutory language must be derived from a considered weighing of relevant aids to construction. *See, e.g.,*

United States v. Dickerson, 310 U.S. 554, 562 (1940). But the starting point for construing a statute is the language of the statute itself and absent expressed congressional intent to the contrary, that language ordinarily must be regarded as conclusive. *See, e.g., Ankenbrandt v. Richards*, 504 U.S. 689, 707 (1992); *Community v. Reid*, 490 U.S. 730, 739 (1989); *Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989); *Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

None of the courts which have addressed the exclusion of punitive damages under § 104(a)(2) have addressed the critical distinction between the first and second clauses of the original statutory language. The lower courts, including the Tenth Circuit in the present case, have addressed only the question whether "the amount of any damages . . . on account of personal injuries or sickness" language in § 104(a)(2) is ambiguous.[7] The ambiguity these courts found has been summarized as follows: "Section 104(a)(2) could mean that all damages recovered in a personal injury suit are excluded, or it could mean that only those damages that purport to compensate the plaintiff for the personal injury suffered are received on account of personal injury." *Wesson*, 48 F.3d at 897. The Fourth Circuit in *Miller* defined the ambiguity it found in terms of "but-for" or "sufficient" causation.

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7. *See Robinson v. Commissioner*, 70 F.3d 34 (5th Cir. 1995); *O'Gilvie v. United States*, 66 F.3d 1550 (10th Cir. 1995) (Pet. App. 1a); *Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994); *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990); *see also Bagley v. Commissioner*, 105 T.C. __, No. 27 (Dec. 11, 1995) (Tax Court no longer will follow its opinion in *Horton v. Commissioner*, 100 T.C. 93 (1993) after *Commissioner v. Schleier*, 515 U.S. __, 115 S. Ct. 2159 (1995)); *but cf. Horton v. Commissioner*, 33 F.3d 625, 631 (6th Cir. 1994) (plain meaning of § 104(a)(2) language does not permit a distinction between punitive and compensatory damages).

> Under a but-for causation approach, the fact that a plaintiff has to sustain a personal injury as a prerequisite to an award of punitive damages leads to the conclusion that the punitive damages were "on account of" the plaintiff's injury .... under a sufficient causation approach, the fact that personal injury is a prerequisite to punitive damages does *not* lead to the conclusion that the punitive damages were "on account of" the plaintiff's injuries because, even if the other elements of the tort are present, personal injury alone does not sustain a punitive damages award.

Miller, 914 F.2d at 590-591 (emphasis in original).

When they find § 104(a)(2) ambiguous, lower courts have resorted to a variety of extrinsic aids to interpret the statute. *See O'Gilvie* (Pet. App. 13a-14a). None of these courts, however, have analyzed the original statutory language as evidence of congressional intent. Neither have these courts analyzed the direct history behind the statute. Instead, they have resorted to more remote, less reliable aids for interpreting the language of § 104(a)(2).

The Fourth Circuit, for example, in *Miller v. Commissioner*, 914 F.2d 586 (4th Cir. 1990), chose to resolve the ambiguity it found in the language of § 104(a)(2) by relying on what it viewed as the statute's underlying purpose. *Id.* at 590. The Fourth Circuit ascertained that underlying purpose not by examining the original statutory language or Congress' intent in enacting that language, but by relying on *Starrels v. Commissioner*, 304 F.2d 574 (9th Cir. 1962), a case decided some forty-four years after the original enactment. "Damages paid for personal injuries are excluded from gross income because they make the taxpayer

whole from a previous loss of personal rights — because, in effect, they restore a loss to capital." *Starrels*, 304 F.2d at 576.

Unfortunately, at least two other courts of appeals also have relied on *Starrels* without considering the original statutory language. *See Wesson*, 48 F.3d at 899; *Hawkins*, 30 F.3d at 1083. Not only is *Starrels* an inappropriate source for ascertaining the statute's purpose, but the Ninth Circuit's discussion of purpose was dicta because the court found that no personal injury had occurred. *Starrels*, 304 F.2d at 575.

Starrels, in turn, relied on *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955). While *Glenshaw Glass Co.* addressed the taxation of punitive damages, it did so in the context of § 22(a) of the 1939 Code, the definition of gross income. The Court concluded that exemplary damages for fraud and the punitive portion of a treble-damage antitrust recovery were "undeniable accessions to wealth, clearly realized" which fit within the encompassing definition of gross income provided by § 22(a). *Id.* at 428-429. What *Glenshaw Glass Co.* did not address was the exclusion of punitive damages received on account of personal injuries under § 22(b)(5) of the 1939 Code, the immediate predecessor to the present § 104(a)(2). No personal injuries were at issue in *Glenshaw Glass Co.* Thus, the Court had no need to, and did not, set forth a "restoration of capital" rationale under then § 22(b)(5).[8] While *Glenshaw Glass Co.* may properly be recognized as an important opinion defining

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8. In reaching its decision in *Glenshaw Glass Co.*, the Court noted that the actual damages received in the case were taxable, which caused the Court to state "it would be an anomaly that could not be justified in the absence of clear congressional intent to say that a recovery for actual damages is taxable but not the additional amount extracted as punishment for the same conduct which caused the injury." *Id.* at 431. This same anomaly occurs when punitive damages are taxed but compensatory damages are excluded when both result from the conduct which caused the injury.

gross income, it simply is not relevant to the interpretation of § 104(a)(2).

Other courts have adopted a "return of capital" theory that only compensatory recoveries are excludable under § 104(a)(2) because they merely make the plaintiff whole from injuries suffered and do not represent an accession to wealth. *See, e.g., Reese v. United States*, 24 F.3d 228, 223 (Fed. Cir. 1994); *Commissioner v. Miller*, 914 F.2d 586, 590 (1990). The return of capital theory is objectionable on more than just statutory construction grounds.[9] When examined, a return of capital rationale does not satisfactorily explain why certain compensatory damages are excludable under § 104(a)(2). *Hawkins*, 30 F.3d at 1087 (Trott, J., dissenting) (example given of automobile accident causing personal injuries which results in recovery of compensatory damages for lost earnings). The recovery of lost earnings on account of personal injuries is clearly excludable under § 104(a)(2). But the plaintiff has been made more than whole. If the plaintiff had worked for those earnings, the plaintiff would have been required to pay taxes on the earnings. But because of the injuries, the plaintiff received more money than if the plaintiff had worked. The same can be argued for the recovery of damages for pain, suffering and emotional distress that can not be measured with precision as in an automobile accident. *See Schleier*, 515 U.S. at __, 115 S. Ct. 2163-2164. Again, the plaintiff is made more than whole. Thus,

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9. The return of capital theory has been widely criticized as a means of explaining the § 104(a)(2) exclusion. *See, e.g., Downey v. Commissioner*, 97 T.C. 150, 159 (1991), *supplemental opinion*, 100 T.C. 634 (1993), *rev'd on other grounds*, 33 F.3d 836 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 719 (1995); Cochran, *1989 Tax Act Compounds Confusion over Tax Status of Personal Injury Damages*, 49 Tax Notes 1565, 1573 (1990); Henning, *Recent Developments in the Tax Treatment of Personal Injury and Punitive Damage Recoveries*, 45 Tax Law, 783, 796 (1992); Henry, *Torts and Taxes, Taxes and Torts: The Taxation of Personal Injury Recoveries*, 23 Hous. L. Rev. 701, 725 (1986).

compensatory damages, like punitive damages, can represent more than a return of capital. *Hawkins*, 30 F.3d at 1087. Even the Tenth Circuit in this case found the return of capital theory "problematic." *O'Gilvie* (Pet. App. 19a).

Further, adoption of the return of capital theory does not foster judicial economy. Making punitive damages received on account of personal injuries taxable would result in litigation over the proper characterization of damages resulting from the settlement of personal injury actions. The vast majority of such actions are settled prior to trial. Under a return of capital theory, parties would have an incentive to avoid characterizing any part of the settlement as punitive damages in order to permit the plaintiff to take advantage of the § 104(a)(2) exclusion.[10] If, however, the parties failed to distinguish between the compensatory and punitive portion of a settlement, or the IRS challenged the parties' characterization, the return of capital theory would require a factual determination of not only whether the suit involved "personal injury or sickness," but also the measure of damages necessary to "compensate" the plaintiff. Such a factual determination approximates the very type of litigation the parties intended to avoid by the settlement. *Miller*, 93 T.C. at 343-344 (1989) (Ruwe, J., concurring).

Some courts have relied on the fact that § 104 is entitled "Compensation for Injuries or Sickness" as evidence of how Congress had only compensatory damages in mind when it enacted § 104(a)(2). *O'Gilvie* (Pet. App. 18a); *Wesson*, 48 F.3d at 898; *Hawkins*, 30 F.3d at 1083; *Reese*, 24 F.3d at 231, citing *Immigration and Naturalization Serv. v. National Ctr. for Immigrants*, 502 U.S. 183, 189-90 (1992) ("the title of a statute

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10. The IRS has ruled that punitive damages incurred by a taxpayer in the ordinary conduct of business operations are deductible as an ordinary and necessary business expense. Rev. Rul. 80-211, 1980-2 C.B. 57, 58. Thus, the defendant's tax consequences are the same regardless of how the damage award is titled.

or section can aid in resolving an ambiguity in the legislation's text"); *Miller*, 914 F.2d at 590. This reliance overlooks the fact that, as discussed above,[11] the title was not added to the provision until the 1939 codification of the Internal Revenue Code, some twenty-one years after the original enactment. This addition of titles, as part of a codification process at a remote point in time and when no reconsideration or revision of the substantive language took place, surely is not reliable evidence of Congress' intent in 1918, the time of the original enactment. Indeed, such reliance contradicts the clear admonition of § 7806(b) of the Internal Revenue Code to disregard such material as a tool for interpreting the Code:

> No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, *nor shall any table of contents . . . or similar outline, analysis, or descriptive matter* relating to the contents of this title *be given any legal effect.*

26 U.S.C. § 7806(b) (emphasis added).

Several lower courts also have relied upon the placement of paragraph (2) in § 104(a) among the other paragraphs to which compensatory purposes are attributed, as evidence of the compensatory purpose of paragraph (2). *O'Gilvie* (Pet. App. 18a); *Wesson*, 48 F.3d at 899; *Reese*, 24 F.3d at 231. Again, this reliance fails to recognize that paragraphs (1), (2) and (3) were originally all part of *the same sentence* in the Revenue Act of 1918. As discussed above,[12] in that sentence Congress drew a

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11. *See* page 16, *supra*.

12. *See* page 18, *supra*.

distinction between accident or health insurance or workmen's compensation, in one instance, and personal injury suits in the other. That sentence remained unchanged until the 1954 codification of the Internal Revenue Code restructured it into three separate, but unrevised clauses. To give weight to the "statutory context" of § 104(a)(2) without examining the history behind that structure ignores congressional intent.

Finally, some courts which have held that the language of § 104(a)(2) does not encompass punitive damages rely on the principle, *see, e.g., Commissioner v. Schleier*, 515 U.S. __, __, 115 S. Ct. 2159, 2163 (1995); *United States v. Burke*, 504 U.S. 229, 248 (1992) (Souter, J., concurring); *Commissioner v. Jacobson*, 336 U.S. 28, 49 (1949), that exclusions to taxable income are to be narrowly construed. *O'Gilvie* (Pet. App. 18a); *Wesson*, 48 F.3d at 898; *Hawkins*, 30 F.3d at 1030; *Reese*, 24 F.3d at 231; *Miller*, 914 F.2d at 590. The petitioners do not dispute this principle, but they do object to premature resort to its use by the courts as a "default rule." Courts viewing the principle of narrow construction as a "default rule" may forego thorough, critical consideration of the language and history of the statute in question.

Indeed, that is precisely what the Tenth Circuit did in this case. Despite opining that the return of capital theory is "somewhat problematic," *O'Gilvie* (Pet. App. 19a), and being "further troubled" by the language of the 1989 amendment to § 104(a)(2), *Id.* (Pet. App. 19a), the Tenth Circuit concluded:

> In sum, it is not clear whether Congress intended to exclude punitive damages from income under §104(a)(2). Although "good reasons tug each way" in this case, we need not decide "which tug harder," because we must follow the default rule that exclusions from income are narrowly construed.

Id. (Pet. App. 22a), quoting *United States v. Burke*, 504 U.S. 229, 248 (Souter, J. concurring). *See also Brabson v. United States*, 73 F.3d 1040, 1047 (10th Cir. 1996) (addressing whether statutorily mandated prejudgment interest awarded in a personal injury suit is excluded by §104(a)(2), "[l]astly, though perhaps most importantly, we are guided by the default rule. . . .").

The principle of narrow construction of exclusions to income must, however, fit within the basic framework for statutory interpretation. The "default rule" does not relieve a court from the duty to evaluate all traditional and relevant aids to construction. Rather, application of the default rule should arise, if, and only if, after carefully scrutinizing a statute's language and history, its meaning remains indecipherable. In other words, courts should not quickly conclude that any uncertainty as to the meaning of a statute triggers the "default rule," as the Tenth Circuit did in this case.

In sum, the Tenth Circuit and other courts holding that § 104(a)(2) does not encompass the exclusion of punitive damages received in personal injury cases have failed to consider the history of § 104(a)(2), including importantly the original statutory language of § 213(b)(6) of the Revenue Act of 1918. As a result, these courts improperly have concluded that § 104(a)(2) is ambiguous and does not exclude punitive damages from gross income.

D. The IRS Itself Has At Times Interpreted § 104(a)(2) To Exclude From Income Punitive Damages Received In Personal Injury Cases

In 1975, the IRS held in Rev. Rul. 75-45, 1975-1 C.B. 47, that "any damages, whether compensatory or punitive, received on account of personal injury or sickness are excludable from gross income." This revenue ruling addressed the issue of

whether the estate of an employee, killed while a passenger in his employer's airplane, had to include as income a sum received under the terms of the employer's aircraft liability insurance policy, or whether such amount was excludable from gross income under § 104(a)(2). The revenue ruling noted that the payments were in exchange for a release of any claims brought under the wrongful death act of the decedent's state of residence. A series of court decisions had established that the payments made under such act were considered punitive in nature. *Id.* The revenue ruling phrased the question as "whether the amount received . . . is excludable from gross income as 'damages received * * * on account of personal injuries or sickness' under the provisions of section 104(a)(2) of the Code, or whether it is includible in gross income as 'punitive damages' under the provisions of section 1.61-14(a) of the Income Tax Regulations." *Id.* In finding that the entire payment the estate received was excludable under § 104(a)(2), the revenue ruling stated:

> Section 104(a)(2) excludes from gross income 'the amount of *any* damages received (whether by suit or agreement) *on account of* personal injuries or sickness' (emphasis added). Therefore, under section 104(a)(2) any damages, whether compensatory or punitive, received on account of personal injures or sickness are excludable from gross income. (emphasis in original)

Id.

Revenue Ruling 75-45 deals with a situation very similar to this case. The injury suffered in both instances is a personal injury, death, and in both instances damages were received. The IRS, in this revenue ruling, correctly observes that *any* damages

received *on account of* personal injuries, whether compensatory or punitive, are excludable from gross income under the plain language of the statute.

Approximately nine years later, however, the IRS issued a contrary ruling with Rev. Rul. 84-108, 1984-2 C.B. 32.[13] This revenue ruling held that § 104(a)(2) does not exclude a punitive damages award from gross income.

The facts in Rev. Rul. 84-108 are essentially the same as those set forth in Rev. Rul. 75-45, with the exception that the wrongful death claim at issue in situation one of Rev. Rul. 84-108 was brought under the laws of Virginia, a state that does not permit the recovery of punitive damages awards in wrongful death cases, while the claim at issue in situation two of Rev. Rul. 84-108 was brought under the laws of Alabama, a state that provides exclusively for punitive damages awards in wrongful death cases. Revenue Ruling 84-108 concludes that a payment made under the Virginia wrongful death statute is excluded from gross income, since the payment is for compensatory damages. However, the IRS concluded that a payment made under the Alabama wrongful death statute is not excluded from gross income, because such damages are deemed to be exclusively punitive damages. Therefore, according to this revenue ruling, a taxpayer, or his estate, will be subject to federal taxation, or not, depending on how their state of residence characterizes the damages at issue.

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13. In Rev. Rul. 58-418, 1958-2 C.B. 18, the taxpayer received an amount in settlement of a libel suit in which the taxpayer had sought compensatory and punitive damages for the publication of false and defamatory matter tending to injure his personal reputation. Relying on *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), this revenue ruling held that the punitive damages received were not excludable from income. 1958-2 C.B. at 19.

Of the two approaches, the one adopted in Rev. Rul. 75-45 not only creates uniformity in the treatment of damages received, but also gives effect to the plain language of § 104(a)(2), namely that gross income does not include any damages received . . . on account of personal injuries or sickness.[14] *See Miller*, 93 T.C. at 342 (Ruwe, J., concurring). Moreover, the interpretation of Rev. Rul. 84-108 is inconsistent with the "generally accepted principle that Congress normally intends that its laws shall operate uniformly throughout the nation." *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204, 209 (1946).

The Tax Court in *Miller v. Commissioner*, 93 T.C. 330, 338-340 (1989) noted how at one time the IRS, in Rev. Rul. 75-45, was of the opinion that compensatory and punitive damages received on account of personal injuries were excludable from gross income, but that the IRS had reversed its position in Rev. Rul. 84-108. *Id.* at 339. The Tax Court found Rev. Rul. 84-108 unpersuasive as it relied on *Glenshaw Glass Co.*, which did not involve taxpayers who received any recoveries on account of personal injuries. *Id.* The Tax Court found the plain meaning of the statutory language of §104(a)(2) did not permit a distinction between punitive and compensatory damages. *Id.* at 338. The court went on to state that the plain meaning of a statute should not be disregarded except to prevent an absurd result or one contrary to legislative intent. *Id.* at 340-341 (citing *United States*

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14. Although General Counsel Memoranda have no precedential value it is interesting to note that in G.C.M. 37398 (Jan. 31, 1978) the Internal Revenue Service acknowledged that the conclusion reached in Rev. Rul. 75-45 is based on a plausible interpretation of the statutory language and that the word "any" is broad enough to cover punitive as well as compensatory damages. The Internal Revenue Service further acknowledged that the conclusion reached in Rev. Rul. 75-45 has the "desirable effect of creating uniformity in the treatment of damages received under the wrongful death statutes of the various states." *Id.* at n.2.

v. American Trucking Assns., Inc., 310 U.S. 534, 543 (1940)). Finding no such exceptions, the Tax Court held that punitive damages were excluded from gross income by §104(a)(2). *Id.* at 341.

The Tax Court addressed the issue again in *Horton v. Commissioner*, 100 T.C. 93 (1993). Rejecting the return of capital theory used by the Fourth Circuit to reverse *Miller*, the Tax Court reaffirmed its decision in *Miller*. *Id.* at 96. The court found that whether damages are paid on account of personal injuries is determined by the nature of the underlying claim. *Id.* "Once the nature of the underlying claim is established as one for personal injury, any damages received on account of that claim, including punitive damages, are excludable." *Id.*

E. The 1989 Amendment To § 104(a)(2) Further Confirms That The Courts Should Interpret The Pre-1989 Version Of The Statute To Exclude Punitive Damages

In 1989, Congress amended § 104(a)(2) to provide that the provision's exclusion "shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, Section 7641, 103 Stat. 2106, 2379 (1989). This amendment does not apply to this case because by its terms, it is not applicable to any recovery of punitive damages under an agreement made, or pursuant to a lawsuit filed, on or before July 10, 1989. *Id.* Nonetheless, one reasonable implication arising from the 1989 amendment is that, as to recoveries on lawsuits filed or agreements made prior to July 10, 1989, all punitive damages on account of personal injury were not taxable; as to recoveries on lawsuits filed or agreements made after July 10, 1989, only punitive damages received in cases involving physical injury or sickness are excludable. *See also Burke*, 504 U.S. at 235 n.6 ("Congress amended § 104(a) to

allow the exclusion of *punitive* damages only in cases involving 'physical injury or physical sickness' ") (emphasis in original).

The genesis of the 1989 amendment appears to be in a reaction to court decisions in which § 104(a)(2) was applied to exclude punitive damages awarded in cases where the individual sustained no physical injury.[15] In explaining the reason for the amendment the House Ways and Means Committee staed that damages for personal injuries should only be excluded when physical personal injuries were involved. *See Revenue Reconciliation Bill of 1989, Explanation of revenue provisions as approved by the House Ways and Means Committee on September 14, 1989*, p. 238. At the Conference Committee it was agreed that "the exclusion for damages received for personal injury does not apply to punitive damages in cases not involving physical injury or sickness." Revenue Provisions of Conference Agreement on H.R. 3299, Omnibus Budget Reconciliation Act of 1989, released by Senate Finance Committee on November 21, 1989, p. 147. This amendment to § 104(a)(2) obviously does not illuminate the intent of Congress in 1918 when it passed the original statute. It does, however, create a situation in which the IRS will receive a windfall at the O'Gilvie children's expense if the plain language of the pre-1989 version of § 104(a)(2) is not given its ordinary and logical meaning.[16]

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15. *See, e.g., Miller v. Commissioner*, 93 T.C. 330 (1989), *rev'd*, 914 F.2d 586 (4th Cir. 1990) (defamation and emotional distress, a nonphysical injury).

16. In holding punitive damages taxable, at least one court has characterized receipt of such damages as a windfall and likened it to the plaintiff winning the lottery. *Hawkins v. United States*, 30 F.3d 1077, 1083-1084 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995). Such a glib characterization is perhaps understandable in a case such as *Hawkins* where the plaintiff's injury was receipt of an inferior car without certain options as a replacement for a car totaled in an accident. However, the O'Gilvie children

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It offends common sense to construe the 1989 amendment to § 104(a)(2) in any other fashion, for "if Congress wanted to clarify that all punitive damages were taxable, why did the amendment create a distinction between physical and nonphysical injury?" *Hawkins*, 30 F.3d at 1086-1087 (Trott, J., dissenting).[17] The IRS must also have been of the understanding that the punitive damages award received by the O'Gilvie children was not subject to taxation as the IRS not only authorized the refunds, but requested, in accordance with § 6405(a), that the Joint Committee on Taxation approve the refunds (App. 74a). The Joint Committee, after examining the basis on which the O'Gilvie children sought the refunds, agreed that the refunds should be allowed (App. 76a). Not until two years after the refunds were received did the IRS have a change of heart and file a lawsuit seeking recovery of the refunded amounts (App. 60a). The O'Gilvie children find this somewhat confusing in light of the fact that it is the Commissioner who

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have clearly not received a windfall as a result of the punitive damages award received in this matter. They lost their mother and unlike the car in *Hawkins* she cannot be replaced nor can their loss be precisely measured. The only windfall in this case will be to the government as a result of timing should this Court determine the punitive damages received by the O'Gilvie children are taxable. Had the O'Gilvie children filed suit and received the punitive damages award after the 1989 amendment to § 104(a)(2), the proceeds would clearly be excluded from income. *United States v. Burke*, 504 U.S. at 235, n.6.

17. Most commentators agree with this interpretation of the 1989 amendment. *See* Andrews, *The Taxation of Title VII Victims After the Civil Rights Act of 1991*, 46 Tax Law. 755, 766 (1993); Cochran, *1989 Tax Act Compounds Confusion over Tax Status of Personal Injury Damages*, 49 Tax Notes 1565, 1567 (1990); Henning, *Recent Developments in the Tax Treatment of Personal Injury and Punitive Damage Recoveries*, 45 Tax Law. 783, 801 (1992); Jaeger, *Taxation of Punitive Damage Awards: The Continuing Controversy*, 57 Tax Notes 109, 114 (1992). *Compare* Kahn, *Taxation of Punitive Damages Obtained in a Personal Injury Claim*, 65 Tax Notes 487 (1994).

issued Rev. Rul. 84-108, and it is presumed that the Commissioner is aware of her own rulings. In short, the 1989 amendment further confirms that punitive damages obtained in all personal injury suits should be excludable from gross income prior to 1989.

II.

THE GOVERNMENT'S SUIT TO RECOVER THE REFUNDS MADE TO THE O'GILVIE CHILDREN WAS UNTIMELY

A. Introduction

When the United States believes that it has made an erroneous refund to a taxpayer, it may bring suit to recover the refund, but "only if such suit is begun within two years after the making of such refund. . ." 26 U.S.C. § 6532(b). The question presented in this case is when the *making* of a refund occurs in the context of a refund check mailed to the taxpayer — the date the check is issued, the date it is mailed or the date the taxpayer receives it.

The United States brought this suit against the O'Gilvie children by filing a complaint in the United States District Court for the District of Kansas on July 9, 1992, seeking to recover the income tax refunds which it had paid to them (App. 60a). The refunds had been paid in the form of United States Treasury checks dated July 6, 1990 (App. 79a), which were received by the children's conservator, by United States mail, on July 9, 1990. *O'Gilvie* (Pet. App. 10a). Thus, the suit was brought more than two years after the issuance and/or mailing of the checks, but exactly two years after the children's conservator received the checks in the mail.

If this Court holds that the *making* of a refund, within the

meaning of § 6532(b), occurs on or after the date upon which a refund check is delivered to a taxpayer, then the suit brought by the United States in this case was timely. If, however, this Court holds that the *making* of a refund occurs either on the date the refund check is issued or is placed in the mail by the government, the government's suit is untimely.

B. The Tenth Circuit Adopted An Erroneous Interpretation Of § 6532(b) In Holding That The Statute Does Not Commence Running Until The Taxpayer *Receives* The Refund

The Tenth Circuit held in this case that the delivery to or receipt by the taxpayer of the refund check is the event which commences the statutory limitations period, in large part on the basis that "a statute of limitation does not begin to run until a suit could be brought." *O'Gilvie* (Pet. App. 10a), quoting *Paulson v. United States*, 78 F.2d 97, 99 (10th Cir. 1935). The Tenth Circuit opined:

> Here, the government could not have brought suit to recover the refund until the taxpayers had received the refund checks on July 9, 1990. Thus, the statute of limitations began to run on July 9, 1990, when taxpayers received their refund checks.

O'Gilvie (Pet. App. 10a).

The interpretation of a statute should be grounded on the words used and their ordinary meaning as enacted. *See Consumer Product Safety Comm.*, 447 U.S. at 108; *Crane*, 331 U.S. at 6. With respect to § 6532(b), the statute declares that the two year limit for filing suit is measured from the *making* of the refund. The statute does not mention the date that the government could first have brought suit. Indeed, if Congress

had meant for the two year period to begin running on the first day a suit could be brought to recover the refund, Congress could have so provided.

Under the statutory language, the start of the two year limitations period is not triggered by an event involving the taxpayer. Instead, § 6532(b) establishes a period which commences upon an act which is solely within the control of the IRS (the *making* of the refund). In common sense terms, the IRS *makes* a refund when a check is signed and deposited with the postal authorities for delivery to the taxpayer. At that point there is nothing further for the IRS to do in order to *make* the refund.

Congress' choice of words in § 6532(b) is crucial. Congress did not provide that the statutory trigger is the *payment* of a refund. Such language would arguably have been more consistent with the Tenth Circuit's holding in this case. The term *payment* logically may be construed to imply that the payee has received satisfaction of the presumed obligation. But Congress chose the term *making*, which suggests a different conclusion; that is, that the payee is not involved in the act which triggers the two year period. The concept of *payment* of a refund logically is susceptible to the construction that it involves not only the *making* of the refund but also its receipt by the taxpayer while only the IRS' conduct is necessary to the *making* of a refund. Because § 6532(b) uses the narrower term *making* rather than the broader term *payment*, the two year limitations period under § 6532(b) should begin, at the latest, when the IRS completes the last act required of it in order for the refund to be *made*— the placing of the check in the mail.

The Tenth Circuit in the present case found that the term *made* must mean *received* by the taxpayer because until receipt by the taxpayer, payment on the check could be canceled or stopped, so the refund is not *made* until that opportunity has

passed. A similar argument was rejected in *United States v. Woodmansee*, 388 F. Supp. 36 (N.D. Cal. 1975), *rev'd on other grounds*, 578 F.2d 1302 (9th Cir. 1978), and *United States v. Bruce*, 642 F. Supp. 120 (S.D. Tex. 1986). These cases held that the limitation period commences prior to the time that the taxpayer cashes the check. They so held even though the government could, theoretically, stop payment on the check *after* the taxpayer receives it. 31 U.S.C. § 3328(a)(1).[18]

C. This Court's Decision In *United States v. Wurts*, 303 U.S. 414 (1938), Does Not Support The Tenth Circuit's Interpretation of § 6532(b)

This Court has addressed § 6532(b) only once, in the form of its predecessor, § 610 of the Revenue Act of 1928, in *United States v. Wurts*, 303 U.S. 414 (1938). In *Wurts*, the government's complaint was filed more than two years after the IRS approved a refund, but less than two years after the refund check was mailed to the taxpayer. The taxpayer contended that Congress intended for the two year limit to be measured from the date the Commissioner approved or allowed the refund (the date the Commissioner signed a schedule of overassessments). This Court disagreed, finding that "[o]nly by ignoring the common understanding of words could 'making . . . [a] refund' be considered synonymous with 'allowing a refund.' " *Id.* at 417.

In *Wurts*, this Court speculated that Congress did not intend that a statute of limitations should begin to run "before the right barred by it has accrued." *Wurts*, 303 U.S. at 418. The Court did not speculate when such right might have accrued, but held only

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18. 31 U.S.C. § 3328(a)(1) provides "[e]xcept as provided in sections 3329 and 3330 of this title, a check drawn on the Treasury may be paid at any time. However, if the Secretary of the Treasury is on notice of a question of law or fact about the check when the check is presented, the Secretary shall defer payment until the Comptroller settles the questions."

that the statutory period "begins to run from the date of payment." *Id.* at 418. Although *Wurts* used the term "payment," there was no mention of a date of delivery, receipt by the taxpayer, presentment or any other such date, other than the date the refund check was mailed. In fact, in its statement of the facts of the case, this Court referred to the mailing as "actual payment." *Id.* at 415. Therefore, this Court could only have meant in *Wurts* that the two year period commences on the date that the IRS places the refund check in the mail for delivery to the taxpayer.

In the present case, the refund checks had to have been mailed no later than Sunday, July 8, 1990, in order for the conservator to have received them in the mail on Monday, July 9, 1990. Since the government's complaint in this case was not filed until July 9, 1992, this suit was begun more than two years after the *making* (mailing) of the refund, and recovery is therefore barred under § 6532(b) and *Wurts*, contrary to the Tenth Circuit's decision.

D. Policy and Practical Considerations Do Not Support The Tenth Circuit's Interpretation Of § 6532(b)

Reference to the dates of receipt by taxpayers of checks delivered by mail would not result in uniform payment dates, and it would be difficult, if not impossible, for the IRS to determine the dates of receipt and thus the dates by which the government must file suits for recovery of erroneous refunds.

"High public interests make it necessary that there be stability and certainty in the revenues of government. These ends are not susceptible of attainment if periods of limitation may be disregarded or extended." *Daube v. United* States, 289 U.S. 367, 372 (1932). Indeed, modern society evinces even greater demand for simplicity, closure and certainty in tax administration. Requiring that the government's suits be filed by

deadlines which must be determined by reference to dates which are known only to taxpayers (if at all) would not provide such simplicity or certainty. In the words of the court in *Bruce*, such a rule would "allow an extension of the limitations statute based on the unpredicted conduct of the taxpayer. . . ." *Bruce*, 642 F. Supp. at 122 n.1. For example, actual receipt by the taxpayer might occur only after (1) the refund check has been delivered to a previous address and forwarded to the taxpayer at his current address; (2) when the taxpayer returns from vacation and picks it up at his post office box or at the general delivery window of the post office; or (3) after the local post office reopens following a Sunday, a holiday or even a natural disaster.

Moreover, a rule that the "making" of a refund occurs when the taxpayer receives it would create additional problems for the government. As just one example, under the Revenue Adjustment Act of 1975, P.L. No. 94-164, § 2(d) (1975), as amended by the Revenue Act of 1978, P.L. No. 95-600, § 105(f) (1978),[19] it is necessary for the government to know the month in

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19. The Revenue Adjustment Act of 1975, Pub. L. No. 94-164, § 2(d) (1975), as amended by Revenue Act of 1978, Pub. L. No. 95-600, § 105(f) (1978), provides:

> (d) Disregard of Refund. — Any refund of Federal income taxes made to any individual by reason of section 43 of the Internal Revenue Code of 1954 (relating to earned income credit), and any payment made by an employer under section 3507 of such Code (relating to advance payment of earned income credit) shall not be taken into account in any year ending before 1980 as income or receipts for purposes of determining the eligibility, for the month in which such refund is made or any month thereafter which begins prior to July 1, 1976, of such individual or any other individual for benefits or assistance, or the

(Cont'd)

which a refund is *made* for purposes of determining eligibility of the taxpayer or his family for benefits or assistance under federally financed programs. As another, under § 6514(a)(2)[20] it is necessary for the IRS to know whether a refund was *made* before or after the expiration of the period of limitation for filing

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(Cont'd)

> amount or extent of benefits or assistance, under any Federal program or under any State of local program financed in whole or in part with Federal funds, but only if such individual (or the family unit of which he is a member) is a recipient of benefits or assistance under such a program for the month before the month in which such refund is made.

20. Section 6514(a) of the Internal Revenue Code of 1986, 26 U.S.C. § 6514(a), provides:

> (a) CREDITS OR REFUNDS AFTER PERIOD OF LIMITATION. — A refund of any portion of an internal revenue tax shall be considered erroneous and a credit of any such portion shall be considered void —
>
> (1) EXPIRATION OF PERIOD FOR FILING CLAIM. — If made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or
>
> (2) DISALLOWANCE OF CLAIM AND EXPIRATION OF PERIOD FOR FILING SUIT. — In the case of a claim filed within the proper time and disallowed by the Secretary, if the credit or refund was made after the expiration of the period of limitation for filing suit, unless within such period suit was begun by the taxpayer.
>
> (3) RECOVERY OF ERRONEOUS REFUNDS. — For procedure by the United States to recover erroneous refunds, see sections 6532(b) and 7405.

suit, for purposes of determining whether the refund was erroneous. And yet another example, under § 9503(c)(3),[21] the Secretary of the Treasury must be able to determine whether a refund is *made* before or after July 1, 2000, for purposes of determining the amount of his required payment from the Highway Trust Fund into the general fund of the Treasury under § 6412(a). In each of these situations Congress surely did not mean that a refund is *made* only when the taxpayer receives the refund check. Such a rule would result in considerable uncertainty and would be unworkable as a practical matter.

Finally, a rule that the *making* of a refund occurs when the taxpayer receives it may encourage the government to allege that a refund was received by the taxpayer at a late date, in hopes that the taxpayer will be unable to prove to the contrary. This Court should not countenance a rule that creates such incentives. At the least, such disputes would ordinarily have to be resolved by fact-finders.

On the other hand, the date of issuance of a refund check or the date of mailing are dates which are always available to the government and generally to the taxpayer, thereby providing simplicity, closure and certainty in tax administration, and minimizing instances of controversy such as in this case.

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21. Section 9503(c)(3) of the Internal Revenue Code of 1986, 26 U.S.C. § 9503(c)(3) provides:

> (3) 1988 FLOOR STOCKS REFUNDS. — The Secretary shall pay from time to time from the Highway Trust Fund into the general fund of the Treasury amounts equivalent to the floor stocks refunds made before July 1, 2000, under section 6412(a).

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court reverse and hold that the government's refund suit was untimely or, in the alternative, that the punitive damages award in this case was not taxable.

Respectfully submitted,

ROBERT M. HUGHES
Counsel of Record
JACK D. FLESHER
GREGORY L. FRANKEN
DAVID B. SUTTON
BEVER, DYE, MUSTARD &
BELIN, L.C.
Attorneys for Petitioners
Kevin M. O'Gilvie and
Stephanie L. O'Gilvie
106 West Douglas, Suite 700
Wichita, Kansas 67202
(316) 263-8294

STEPHEN R. McALLISTER
Of Counsel
University of Kansas School of Law
Green Hall
Lawrence, Kansas 66045
(913) 864-4550

Nos. 95-966, 95-977

Supreme Court, U.S.
FILED
MAY 9 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE, minors,

Petitioners,

-and-

KELLY M. O'GILVIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER KELLY M. O'GILVIE

LINDA D. KING
Counsel of Record
Attorney for Petitioner
Kelly M. O'Gilvie
6135 East Central
Wichita, Kansas 67208
(316) 686-2000

8702-B
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tenth Circuit Court of Appeals in its decision in *O'Gilvie v. United States*, 95-2 USTC ¶ 50,508 (10th Cir. 1995) has interpreted a federal statute in a manner that unreasonably limits enforcement of legislative intent and inpermissibly mandates a finding in favor of the government.

2. Whether a punitive damages award received in a suit involving physical injury is excludable from gross income as "any damages . . . received on account of personal injuries. . . ." 26 U.S.C. § 104(a)(2).

3. Whether the federal district court is required to strictly comply with Federal Rules of Civil Procedure in order to modify its judgments or has power independent of the Federal Rules to modify its judgment.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Parties are Kelly M. O'Gilvie, Petitioner, case number 95-977; Kevin M. O'Gilvie and Stephanie L. O'Gilvie, case number 95-966.

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II. Both this Court in *Schleier* and the Sixth Circuit in *Horton* found the statute *unambiguous*, yet arrived at opposite conclusions about the meaning and results. This Court in *Burke* and the Tenth Circuit in *O'Gilvie* found the statute *ambiguous* and yet articulated different and mutually exclusive tests, the conflict between the circuit courts is not resolved by application of the principals of statutory interpretation described by this Court in *Schleier*. 20

III. The Tenth Circuit has entered a decision that is in clear conflict with the enacting Congress' original intent of the meaning of the words of the Revenue Act of 1918 Section 213(b), the direct predecessor of I.R.C. § 104(a)(2). 25

IV. The rationale underlying the decision of the Tenth Circuit is contrary to and overrules a long line of settled case law that has been relied upon by taxpayers, counsel, tax advisors, and the IRS to interpret I.R.C. § 104(a)(2). Such rationale applies a "compensatory purpose" test rejected by those cases. 36

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OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit in *O'Gilvie v. United States* is reported at 66 F.3d 1550 (10th Cir. 1995), 95-2 USTC ¶ 50,508, and is reprinted in the Petition for Writ of Certiorari appendix at page 1. The decision of the district court rendered on November 30, 1993 is reprinted in the Petition for Writ of Certiorari appendix at pages 31 and 37, and the Amended Judgment and decision rendered on December 7, 1993 is reprinted in the Petition for Writ of Certiorari appendix at page 38.

STATEMENT OF JURISDICTION

The Tenth Circuit issued its decision on September 19, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions listed below are included in the appendix:

26 U.S.C. § 61(a), Petition for Writ of Certiorari appendix at 49.

Revenue Act of 1918, Section 213(b)(6), Petition for Writ of Certiorari appendix at 49.

26 U.S.C. § 104(a), Petition for Writ of Certiorari appendix at 49.

1989 Amendment to 26 U.S.C. § 104(a), Petition for Writ of Certiorari appendix at 49.

Treasury Regulation § 1.104-1(c), Petition for Writ of Certiorari appendix at 50.

Federal Rule of Civil Procedure 60(a), Petition for Writ of Certiorari appendix at 44.

STATEMENT OF FACTS

In 1983, Betty O'Gilvie died of toxic shock syndrome. In 1988, her estate was awarded, in addition to other damages, $10 million in punitive damages against International Playtex, Inc. After payment of attorney's fees and expenses, the balance of the award was paid to Betty O'Gilvie's heirs at law: her husband, Kelly O'Gilvie, and her children, Stephanie O'Gilvie and Kevin O'Gilvie. Kelly O'Gilvie, the Petitioner, and the children paid the taxes on the punitive damages. Kelly O'Gilvie and the conservator, on behalf of the children, made proper administrative application for refund of those taxes based upon the 26 U.S.C. § 104(a)(2) (hereinafter § 104(a)(2)) exclusion. Petitioner's request for refund was denied. The refund of the children's taxes was recommended by the Commissioner of the Internal Revenue to the Joint Committee of the United States Congress on Taxation, approved and paid in July 1990.

In the federal district court of the district of Kansas, Kelly O'Gilvie sought a refund for taxes paid on the punitive damages award. On May 26, 1992, the district court granted summary judgment in favor of the IRS on the issue of the taxability of punitive damages. (Petition for Writ of Certiorari appendix at 25). On that same day, this Court issued its decision in *United States v. Burke*, 504 U.S. 229, 112 S. Ct. 1867, 92-1 USTC ¶ 50,254 (1992). Petitioner filed a motion for reconsideration, which the district court granted. **Judgment** was entered on August 26, 1992 in favor of the taxpayer, finding that § 104(a)(2) exempted from taxation the award of punitive damages that

taxpayer had received on account of physical injuries. (Petition for Writ of Certiorari appendix at 26 and 29).

The decision that taxpayer's punitive damage award was exempt from taxation under § 104(a)(2) was necessary to render justiciable a second issue of whether an "additional amount" of damages was taxable interest or additional punitive damages and, therefore, also exempt from tax. On October 27, 1992, the district court withdrew its order of August 26, 1992 on the issue of taxability of punitive damages stating:

> Accordingly, pursuant to Rule 60(a), Fed. R. Civ. P, the judgment entered on August 26, 1992 is hereby withdrawn, *subject to reinstatement at the conclusion of the case*.

(Emphasis added). (Petition for Writ of Certiorari appendix at 30).

The second issue was briefed and the district court considered whether the "additional amount" was characterized as punitive damages, and also exempt from tax under § 104(a)(2). The district court entered **Judgment** on November 30, 1993 characterizing the "additional amount" as taxable interest and not as additional punitive damages. (Petition for Writ of Certiorari appendix at 37). The district court states in the introductory paragraph of the **Memorandum and Order** of November 30, 1993:

> In a previous opinion, this court held O'Gilvie's punitive damages award was excludable from income tax pursuant to § 104(a)(2) of the Internal Revenue Code.

(Petition for Writ of Certiorari appendix at 31).

On December 7, 1993, the district court entered on its own initiative under Federal Rule of Civil Procedure 60(a), what the court entitled ***Amended* Judgment** which included the omitted portion of the November 30, 1993 **Judgment**. (Petition for Writ of Certiorari appendix at 39). *No motion to amend or correct the judgment was made by either party at any time.* Taxpayer filed timely notice of appeal on January 5, 1994 on the issue of the characterization of the "additional amount." Defendant filed its notice of appeal on February 1, 1994, more than sixty (60) days from the entry of judgment on November 30, 1993.

SUMMARY OF THE ARGUMENT

The Tenth Circuit, upon finding § 104(a)(2) ambiguous, has improperly expressed and applied an improper "default rule" in favor of the government. The Tenth Circuit found that analysis of extrinsic evidence to interpret the statute, § 104(a)(2), was not necessary. While the "clear intent" to exclude must be found in a taxing statute, that "clear intent" may be found from interpretation of extrinsic facts. Clear and unambiguous language is not a mandatory prerequisite for a finding of "clear intent" to exclude. The "principle of narrow construction" is not a "default rule" that relieves the court from comprehensive review of extrinsic evidence. The premature application of a "default rule" impermissibly limits the full expression and enforcement of Congressional intent.

The proper method of statutory construction for § 104(a)(2) must begin with a review of the words themselves. If these words are ambiguous, the Court must, in order to give full voice and authority to the intent of Congress, review the relevant extrinsic evidence to interpret those words. At least six appellate courts, including the Tenth Circuit in *O'Gilvie* and this Court in *Burke*, have found the words ambiguous. The Sixth Circuit in *Horton*, the Federal Claims Court in *Reese*, and this Court in *Schleier*

have recently found the language plain. However, those three courts have interpreted the statute antagonistically. Reasonable persons have found the statute susceptible to two interpretations.

Understanding the nature of the ambiguity is critical to understanding the confusion which plagues this statute and which must be resolved to decide this case. Ambiguity, by its nature, means two competing or conflicting interpretations of the same language. Resolution of ambiguity requires a choice between the two conflicting interpretations. This statute is a unique case of a patent structural ambiguity. That is, the entire phrase has two distinct meanings, one expressed in the Treasury Regulation, *Threlkeld*, 848 F.2d 81 (6th Cir. 1988), and affirmed in *Burke*; and the other expressed in *Miller*, 914 F.2d 586 (4th Cir. 1990), and progeny.

As an example of structural ambiguity, consider the sentence, "*He told his father he was getting fat.*" In one "clear" interpretation, the *father* was getting fat. In the other interpretation, just as "clear," the *son* was getting fat. The sentence can be read either way with a "clear" meaning, but not both ways at the same time. In a phrase which has a patent structural ambiguity, the interpretations are mutually exclusive. Likewise in § 104(a)(2), the competing interpretations are mutually exclusive. The only method of interpreting which meaning was "intended" is to resort to extrinsic evidence.

For well established reasons, the authority and weight of various extrinsic facts is hierarchical. Of first significance, when the statute is ambiguous, is the language of the prior statute. *Hamilton v. Rathbone*, 175 U.S. 414. Here, the language of the original statute was plain and clearly limited the *type of tort claim* only. Of next significance is the extant Treasury Regulation § 1.104-1(c), published in 1956, which expresses the interpretation that limits the *type of tort claim*. The consistent

administrative practice of excluding punitive damages in cases involving personal injury adds authority to the interpretation of the statute as limiting the *type of claim* and not the *type of damages* that flow from the claim. However, it is the reenactments and amendments made by Congress that carry the greatest weight when those reenactments and amendments required the scrutiny of Congress, as here, and Congress did not change the language to vary the exclusion for punitive damages.

This history from 1918 until 1984, during which time the federal courts scrutinized the language of § 104(a)(2) in at least thirty (30) separate decisions to find that the words "on account of personal injury" modified only the *type of tort claim* and not the *type of damages*, should have led the IRS to the irresistible conclusion that the correct interpretation of the ambiguous statute was the one expressed in the Treasury Regulation, consistently followed by the IRS and approved by Congress.

However, the IRS chose to disregard the very heavy weight of these extrinsic facts to promote an ambiguity in the statute. The ambiguity was created when the original statute was separated in the 1954 Internal Revenue Code. Rev. Rule 84-108 is significant as the litigation position of the IRS because it spotlights the ambiguity. In contrast to the very heavy weight accorded the wording of the original statute to resolve an ambiguity, the Treasury Regulation, published in 1956, the extensive caselaw which construes these words of § 104(a)(2) as meaning a limit on the *type of tort claims* only, and the long standing administrative practice of the IRS (*see* Rev. Rule 75-45), the weight accorded the new Rev. Rule 84-108 is slight.

The courts which have followed the IRS' position have done so out of an unwarranted deference to the IRS' litigation position, and in their efforts to protect the fisc, have applied a method of statutory construction that fails to give full voice and

authority to the intent of Congress. Proper statutory construction requires a choice between the two conflicting interpretations, and the very heavy weight of the intrinsic evidence compels the choice of the interpretation expressed in Treasury Regulation § 1.104-1(c).

The only authority under which the district court could amend its **Judgment** of November 30, 1993 on its own initiative and without motion by a party was under Federal Rule of Civil Procedure 60(a). Because Fed. R. Civ. P. 60(a) does not toll the time for notice of appeal, the IRS' notice of appeal on February 1, 1994, was more than sixty (60) days from the issuance of the **Judgment**, and the Tenth Circuit did not gain jurisdiction to hear the cross-appeal on the issue of § 104(a)(2).

DISCUSSION

I.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS EXPRESSED AND APPLIED A METHODOLOGY OF STATUTORY CONSTRUCTION WHICH PLACES AN IMPERMISSIBLE RESTRICTION UPON THE ENFORCEMENT OF CONGRESSIONAL LEGISLATIVE INTENT. UPON A FINDING OF INTRINSIC AMBIGUITY IN THE WORDS OF THE STATUTE, THIS METHODOLOGY REQUIRES THE COURT TO IMMEDIATELY APPLY A "DEFAULT RULE" IN FAVOR OF THE GOVERNMENT.

The duty of all federal courts is to discern the meaning intended by the enacting Congress in the words they wrote. When that intent is evident in the words of the statute, the meaning is plain. If those words are found to be ambiguous, the meaning must be interpreted by resorting to extrinsic facts. The courts have an obligation, consecrated by our constitution and common law, to give full voice to the Congressional acts if those acts are constitutional and within the power and authority of Congress. There has been no suggestion that exemption of punitive damages from taxation is outside the constitutional power and authority of Congress.

Rigorous inquiry into the "intent of Congress" assures the full expression of the purposes of our government's legislative branch and full enforcement of that expression. Premature application of a "default rule" in favor of the government is a suppression of that Congressional intent. The Tenth Circuit found that the statute, § 104(a)(2), is susceptible to two meanings and therefore must succumb to the "default rule." In applying a default rule prematurely, the Tenth Circuit neglected a primary

duty of the court, namely to interpret the intent from extrinsic evidence, if necessary, to give full expression to the acts of Congress. There is ample extrinsic evidence for interpretation of this statute. The Tenth Circuit did not find that interpreting the meaning of the statute was not possible, only that it was not necessary. The reality in *O'Gilvie* is that the intent of Congress is a tattered flag that the Tenth Circuit and those courts it follows do not feel obliged to salute.

This diminishment of the proper role of extrinsic evidence in the construction of Congressional intent was first practiced in interpretation of § 104(a)(2) by the Fourth Circuit in *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990). The Fourth Circuit begins its analysis of § 104(a)(2) thus:

> At the outset, we reject the conclusion of the Tax Court that the plain meaning of § 104(a)(2) compels exclusion of punitive damages from gross income. . . . Instead, *we find that § 104(a)(2) is ambiguous* as to which form of causation is intended by "on account of."

(Emphasis added). *Miller*, 914 F.2d at 590.

In the next step of analysis, the Fourth Circuit's misunderstanding of the proper method of statutory construction is revealed:

> Given the *inherent ambiguity* of § 104(a)(2), we must resort to extrinsic aid to interpretation. . . . First, as the Tax Court recognized, it is a well-recognized, even venerable, principle that exclusions to income are to be construed narrowly. . . .

> **Given that § 104(a)(2)'s language is not plain, the principle is applicable and inclines us to adopt the Government's more restrictive view of what kinds of damages are excludable from gross income under the section.**

(Emphasis added). *Miller*, 914 F.2d at 590.

The flaw is precisely this: The "principle of narrow construction" is not a "default rule" that relieves the court from comprehensive review of extrinsic evidence. The "principle of narrow construction" requires that the intent be discerned from the careful analysis of all extrinsic evidence and that a clear intent to *exclude* is evidenced. The Fourth Circuit did not apply two tests, but expressly adopted the more restrictive of the two tests.

The Fourth Circuit continued its incomplete and flawed analysis by application of only one actual extrinsic aid to interpretation, and that one even forbidden by statute. The Fourth Circuit found an underlying "compensatory purpose" mandated in the descriptive title and arrangement of § 104(a)(2), notwithstanding the fact that such interpretation is expressly prohibited by the Internal Revenue Code at § 7806(b). (Petition for Writ of Certiorari appendix at 40).

In its determination that § 104(a)(2) has an underlying "compensatory purpose," the Fourth Circuit failed to address the careful and considered determinations of the Tax Court and the Sixth Circuit in *Threlkeld* and its progeny that awards are *not required* to be a return of capital or compensatory to be excluded under § 104(a)(2). *Threlkeld v. C.I.R.*, 848 F.2d 81 (6th Cir. 1988); *Burke v. United States*, 504 U.S. 229, 112 S. Ct. 1867 (1992), 92-1 USTC ¶ 50,254; *C.I.R. v. Schleier*, 515 U.S. __, 115 S. Ct. 2159, 95-1 USTC ¶ 50,309 (1995). *See* n. 2, *infra*.

The clearly established Congressional policy to provide tax relief for amounts received because of injury and the death of another is entirely ignored by the Fourth Circuit. The exclusion for amounts received under accident and health plans and the amount of any damages "received on account of personal injuries" was enacted with a humanitarian purpose, "to relieve burdens of sick and disabled through tax relief." § 104(a)(2), (3) (1982) (originally enacted as Revenue Act of 1918, § 213(b)(6), *supra*) *Kuhn v. United States*, 258 F.2d 840, 842 (3rd Cir. 1958); *see also, Epmeier v. United States*, 199 F.2d 508, 511 (7th Cir. 1952); *Huddell v. Levin*, 395 F. Supp. 64, 87 (D.N.J. 1975); *Downey*, 97 T.C. 150 at 4396.

In Part III of Subchapter B of Internal Revenue Code, five of the thirty-six exclusions from gross income are expressions of this Congressional policy of exclusion when money is received by reason of injury, sickness or death. Amounts received under a contract of life insurance, a windfall, are paid by reason of the death of the insured and are excluded under § 101(a). Death benefits (up to $5,000) received from employers, also either a windfall or compensation, are excluded from gross income under § 101(b). Property acquired by bequest, devise or inheritance, that is, by the reason of the death of the donor, is likewise excluded under § 102. Bequests, devises and inheritances are undoubtedly windfalls. Amounts received under health and accident plans are excluded under § 105. Amounts received as periodic payments as damages on account of personal injury are excluded under § 130. And here, under § 104(a)(2) the amount of any damages received in a suit for personal injury is excluded. The Congressional policy of excluding income from tax for those who are afflicted and bereaved is manifested throughout this Part III. The IRS' assertion that the only relevant tax policy is full taxation of compensation denies the existence of Congress' expression of this powerful social policy to benefit those visited by tragedy.

In construing the ambiguous language, the Fourth Circuit did not examine the prior statutory language to clarify this "ambiguous" statute. *See Hamilton v. Rathbone*, 175 U.S. 414. And, despite the abundance of extrinsic evidence which surrounds this statute, the Fourth Circuit did not consider any extrinsic evidence other than the title of the section. In short, meaning of the statute was not properly construed by the Fourth Circuit in *Miller*. *See Crane v. Commissioner*, 331 U.S. 1 (1947). The statute was improperly interpreted by application of a "default rule," and yet the incomplete and incorrect analysis dominates the decisions in the Circuits.

This domination of the Fourth Circuit's analysis in *Miller* has come as the result of the misunderstanding and confusion between the "principle of narrow construction of exclusions from income" and a "default rule." The "default rule" was actually used by the Fourth Circuit and imitated in the cases which follow it, including the Tenth Circuit in *O'Gilvie*. The "principle of narrow construction" is *not* a "default rule" that relieves the court from comprehensive review and analysis of extrinsic evidence. The "principle of narrow construction" requires that the intent be discerned from the careful analysis of all extrinsic evidence and that a *clear intent to exclude* be evidenced.

An ambiguous statute *does not* trigger a "default rule" in favor of the government. The words "any damages . . . received on account of personal injuries," can express the requisite intent, whether by plain meaning *or* from interpretation of extrinsic evidence. The inevitable consequence of such a premature application of a "default rule" is the denial of the full expression and enforcement of the intent of Congress.

Even after the Fourth Circuit's incorrect decision in *Miller*, numerous other courts continued to follow the proper

methodology. Upon finding that the statute was *unambiguous*, some courts applied the *plain meaning* of the original statute to exclude the income from taxation. *Pistillo*, 912 F.2d 145 (6th Cir. 1990); *Burke*, 929 F.2d 1119 (6th Cir. 1991); *O'Gilvie*, 92-2 USTC ¶ 50,567 (D. Kan. 1992); *Hawkins*, 93-1 USTC ¶ 50,208 (D. Ariz. 1993), *Horton*, 100 T.C. 93 (1993); *Horton*, 33 F.3d 625 (6th Cir. 1994); *McKay*, 102 T.C. 465 (1994); and *Bennett*, 30 Fed. Cl. 396 (1994). *See also Hawkins*, 30 F.3d at 1085, dissent of Judge Trott. Before 1990, *see also Miller*, 93 T.C. 330 (1989). These courts which found the meaning *plain*, also found that the statute *excluded* the damages from taxation.

Other courts, upon finding that the words of the statute were *ambiguous*, applied a more complete analysis to interpret the ample extrinsic facts attendant upon this statute. *Threlkeld*, 87 T.C. 1294 (1986); *Threlkeld*, 848 F.2d 81 (6th Cir. 1988); *Metzger*, 88 T.C. 834 (1988); *Downey*, 97 T.C. 150 (1991); *Burke*, 504 U.S. 229; *O'Gilvie* 92-2 USTC ¶ 50,567 (D. Kan. 1992).

After this Court's decision in 1992 in *Burke*, the IRS began to argue for the first time that the phrase — "any damages received (whether by suit or agreement) on account of personal injuries" — has two distinct meanings and creates two distinct tests for excludability under § 104(a)(2). In 1993, the district court in *Rice v. United States*, 834 F. Supp. 1241 (E.D. Cal. 1993), *aff'd without opinion*, 35 F.3d 571 (9th Cir. 1994), made no attempt to interpret or construe the statute, but applied two tests forthwith, one approved in *Burke*, the "nature of underlying claim" test, and the other the Fourth Circuit's "compensatory purpose" test. This decision of the district court in *Rice* was the first time a court had derived two separate tests for § 104(a)(2) from the same language.

The Fourth Circuit in *Miller* had not adopted two tests. The Fourth Circuit in *Miller* chose the more restrictive of two competing interpretations. *Miller*, 914 F.2d at 590, 591.

> Given that § 104(a)(2)'s language is not plain, the principle is applicable and *inclines us to adopt the Government's more restrictive view of what kinds of damages* are excludable from gross income under the section.

Those courts which have followed *Miller* have followed the "default rule" and likewise have chosen the *more restrictive* of the two interpretations. *See also Robinson*, 70 F.3d 34 (5th Cir. 1995).

In *Burke*, this Court stated the first issue to be addressed:

> The Court of Appeals **concluded** that exclusion under § 104(a)(2) *turns on whether the injury and the claim are "personal and tort-like in nature." Id. at 1123. "If the answer is affirmative," the court held, "then that is the beginning and the end of the inquiry* (internal quotation omitted), *Id.* at 1123.

(Emphasis added). *Burke*, 504 U.S. 229, 112 S. Ct. 1867, 92-1 USTC ¶ 50,254 (1992).

In direct response to this conclusion, this Court stated:

> We thus agree with the Court of Appeal's analysis insofar as it focused, for purposes of § 104(a)(2) on the nature of the claim underlying respondent's damages award. See

> 929 F.2d, at 1121; *Threlkeld v. C.I.R.*, 87 T.C., at 1305. Respondent, for their part agree that this is the appropriate inquiry, as does the dissent. . . . In order to come within the § 104(a)(2) income exclusion, respondents therefore must show that Title VII, the legal basis for their recovery of back pay, redresses a tort-like personal injury in accord with the foregoing principles. We turn next to this inquiry.

The Fourth Circuit and this Court were required to interpret the meaning of the phrase "on account of personal injury" and each court expressly adopted the alternative interpretation.

The application of two tests by the district court in *Rice* without analysis is of little significance in the determination of the meaning of the words. However, the lure of avoiding the problem of analysis by the handy expedient of using both tests was too powerful to resist. The Fifth Circuit in *Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995), 94-1 USTC ¶ 50,139, *reh'g denied*, 1995 U.S. App. Lexis 12,574, and the Ninth Circuit in *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995), found the statute ambiguous, applied two tests and found that, under the application of both tests, punitive damages were taxable. This Court in *Schleier*, 95-1 USTC ¶ 50,309 at 88,117, avoids finding that an *unambiguous* statute has two distinct interpretations by denying that the Treasury Regulation is one interpretation of the statutory language:

> The regulatory requirement that the amount be received in a tort type action is not a substitute for the statutory requirement that the amount be received "on account of

> personal injuries or sickness;" it is an additional requirement.

All the courts, except the Federal Court of Claims in *Reese* and this Court in *Schleier*, which have found the language of the statute *plain* since Revenue Rule 84-108 raised the question of "ambiguity," have found that the *plain language* mandates the test expressed in the Treasury Regulation. Only the majority decision of this Court in *Schleier* and the Federal Court of Claims in *Reese* have found the language *plain* and yet applied the *Miller* "compensatory purpose" test.

How could this inconsistent record have been created? Perhaps a results-oriented interpretation of a statute caused the courts to turn Nelson's blind eye to the competing interpretation. Punitive damage awards themselves have been the subject of recent unfavorable controversy and litigation. Or perhaps the very human tendency to reject ambiguity in language and to cling to the impression that is strongest in the reader's mind is the dynamic that has caused some courts to clutch at one view, and deny the other. Unwarranted deference to the utterances of the IRS has played a part no doubt. *Burford*, 642 F. Supp. at 636. Or perhaps the problem lay with the inability of the courts to see the nature of the ambiguity. The articulation of the exact problem has not been a part of any decision up to this time. Whatever combination of reasons, the alternating, and sometimes simultaneous, application of two distinct, competing meanings from the same language has created an untenable record.

The fundamental feature of ambiguity is two or more competing interpretations of the same word or phrase. The test for ambiguity is whether reasonable persons could differ in their interpretation. *Marathon Le Tourneau Company v. National Labor Relations Board*, 414 F. Supp. 1076, 1080. Since 1984, numerous courts have expressly found § 104(a)(2) susceptible to

two distinct interpretations. And in the courts which have found the statute plain, that "plain" meaning has been interpreted disparately.

The Petitioner maintains that the statute was not ambiguous in its original enactment by Congress. The separation of the statute in 1954 into two parts created a situation that required the clarification of the meaning by Treasury Regulation § 1.104-1(c). The "clear intent" to exclude was evident in the original statute and in the 1954 version when read with the Treasury Regulation. The appearance that there was not a *clear intent to exclude* was created by the IRS when it published Rev. Rule 84-108 as its litigation position. The Commissioner's statement in Rev. Rul 84-108 was incorrect because he misread (intentionally) the current statute § 104(a)(2) without the Treasury Regulation which supplied the meaning from the first clause of the original statute when the statute was separated in 1954.

If this statute is ambiguous, then the nature of ambiguity becomes important. The ambiguity found here is not latent ambiguity, where the defect is in some extrinsic fact as to what a word means. For example, the word *bill* is latently ambiguous because it may mean the beak of a duck, the check for dinner, a name, to charge for a service, or a proposed law. Instead the ambiguity that troubles the reader of this statute is a patent ambiguity, one that is intrinsic to the statute itself. More specifically, the ambiguity here is one of a unique species, a patent structural ambiguity. Whether a particular word means more than one thing is of no concern. Whether the entire phrase has two meanings, and therefore creates two tests, is the crux of the matter.

Conceptually, by simply labeling § 104(a)(2) *ambiguous*,

the case is proved. Ambiguity demands a choice between two. However, a more thorough understanding is useful. Two examples will illustrate the nature and limitations of patent structural ambiguity. Consider the following sentence:

Flying planes can be dangerous.

The first meaning that a reasonable person could draw from these words is that being a *pilot* can be dangerous. The second, that an *observer* is in danger from planes flying overhead. Neither interpretation is confusing, but the sentence is structurally ambiguous. Extrinsic evidence must provide the key to interpretation. The one certainty is that the sentence cannot have both meanings at the same time. The observer is not flying the plane, neither is the pilot on the ground with a plane overhead. The interpretations are mutually exclusive.

Consider an even clearer example:

He told his father he was getting fat.

In one "clear" interpretation, these words convey the meaning that the *father* was getting fat. In the other interpretation, just as "clear," that the *son* was getting fat. The sentence can be read either way, but not both ways at the same time. The only method of interpreting which meaning was "intended" is to look to extrinsic evidence.

Consider now the original statute, § 213(b)(6):

> Amounts received through accident or health insurance or under workman's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness.

In the first interpretation, the phrase "on account of such injuries," modifies the *type of suit*. This first test has been articulated as excluding "those damages which are received through prosecution of a legal suit or action based upon tort or tort-type rights, or through a settlement agreement entered into in lieu of such prosecution." Treas. Reg. § 1.104-1(c); *Burke*, 504 U.S. 229, 112 S. Ct. 1867, 92-1 USTC ¶ 50,254 (1992); *Threlkeld*, 848 F.2d 81 (6th Cir. 1988); *Threlkeld*, 87 T.C. 1294 (1986).

In the second interpretation, the phrase "on account of such injuries" modifies the *type of damages*. The second test has been articulated as meaning that the damages must be compensatory of the personal injury. *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990), 90-2 USTC ¶ 85,713 (1990); *O'Gilvie v. United States*, 66 F.3d 1550 (10th Cir. 1995), 95-2 USTC ¶ 50,508. Both interpretations are clear, neither is confusing. The phrase is "ambiguous" because the entire clause has two distinct meanings. However, only one test can be derived from this language. The key to which meaning was intended must come from extrinsic evidence.

Even though the statute is structurally ambiguous, the words of the statute must be interpreted in a manner that is reasonable, consistent, and most importantly, with only one interpretation. This Court must, as it did in *Crane*, *supra*, interpret from extrinsic evidence to determine which of the two mutually exclusive and competing interpretations was intended by the enacting Congress and the later Congresses that separated the clauses, and knowingly approved and amended the statute.

II.

BOTH THIS COURT IN *SCHLEIER* AND THE SIXTH CIRCUIT IN *HORTON* FOUND THE STATUTE *UNAMBIGUOUS*, YET ARRIVED AT OPPOSITE CONCLUSIONS ABOUT THE MEANING AND RESULTS. THIS COURT IN *BURKE* AND THE TENTH CIRCUIT IN *O'GILVIE* FOUND THE STATUTE *AMBIGUOUS* AND YET ARTICULATED DIFFERENT AND MUTUALLY EXCLUSIVE TESTS. THE CONFLICT BETWEEN THE CIRCUIT COURTS IS NOT RESOLVED BY APPLICATION OF THE PRINCIPALS OF STATUTORY INTERPRETATION DESCRIBED BY THIS COURT IN *SCHLEIER*.

The cases of *Horton* in the Sixth Circuit and *O'Gilvie* in the Tenth Circuit share two essential characteristics. In both, the nature of the underlying claim is undeniably a tort and there is physical injury: in *O'Gilvie* a death, and in *Horton*, damage to a residence. No other circuit has dealt with a case involving both characteristics.

The legal analysis of whether an award made under the federal anti-discrimination statute is excluded under § 104(a)(2) as in *Burke* and *Schleier*, in the narrow sense, is not applicable to the determination of whether awards are excludable when it is uncontested that there is an underlying physical injury claim as in *O'Gilvie*. The *Burke* and *Schleier* decisions do not address punitive damages awarded in a case which involves physical injury, but only whether ADEA damages are excluded. However, the circuit courts in *Horton* and *O'Gilvie* rely largely upon the analysis provided by these two cases. Because the IRS did not seek review of the decision of the Sixth Circuit in favor of the taxpayer in *Horton*, this is the first opportunity to clarify the exclusion in a case in which the underlying tort is for physical injury.

Despite the similarities in the two cases, these two sister courts were unable to agree on the meaning or even a *method of construction* of the meaning of the words in § 104(a)(2). Even after *Schleier*, the Tenth Circuit does not, because it cannot logically, follow the methodology of the *Schleier* decision.

The source of the confusion in the courts since 1984 regarding the status of the law is demonstrated in the application of that case law by the Tenth Circuit. The Tenth Circuit overruled the district court decision finding that § 104(a)(2) is susceptible to at least two different meanings, and is, therefore, *ambiguous*.

> Neither the *Burke* nor the *Schleier* Court addressed the question whether the phrase in § 104(a)(2) "on account of" personal injuries is ambiguous. With respect to this [question or ambiguity] *we agree with the four circuits that have found it is susceptible of at least two meanings*.

(Emphasis added). *O'Gilvie*, 95-2 USTC ¶ 50,508 at 89,639.

Upon the finding of *ambiguity*, the Tenth Circuit then employs the appealing but defective method of immediate reliance upon a "default rule" to the exclusion of all other methods of statutory construction:

> In sum, it is not clear whether Congress intended to excluded punitive damages from income under § 104(a)(2). *Although "good reasons tug each way" in this case, we need not decide "which tug harder," because we must follow the default rule that exclusions from income are narrowly construed.*

(Emphasis added). *O'Gilvie*, 95-2 USTC ¶ 50,508 at 89,641. **The Tenth Circuit specifically holds that the only requirement in the face of ambiguity is to construe the provision strictly in favor of the government.** The Tenth Circuit did not follow the methodology of *Schleier* to find the meaning *plain* even though the Tenth Circuit states that it follows *Schleier*. Use of a "default rule" when the statute is ambiguous is appealing in its simplicity and directness, and, in view of the unique type of ambiguity in the statute, understandable. This methodology, however, has produced seemingly irreconcilable results. It is this flaw in method which is the source of great confusion.

The Fourth Circuit in *Miller*, the Federal Circuit in *Reese*, the Fifth Circuit in *Wesson*, the Ninth Circuit in *Hawkins*, the Tenth Circuit in *O'Gilvie*, and this Court in *Schleier* have found the "default rule" controlling. The statute was found to be *ambiguous* in *Miller, Reese, Hawkins, Wesson* and *O'Gilvie*. However, the statute was found to be plain in *Schleier*. If the statute is *plain and unambiguous*, there is no need to resort to a "default rule." If the statute is *ambiguous*, construction by resort to extrinsic evidence is required and a "default rule" has no function.

The fact that this Court found the statute *ambiguous* in *Burke*, but found the same language *plain* in *Schleier* illustrates the confusion. Notwithstanding the statement by the Tenth Circuit in *O'Gilvie* that "[n]either the *Burke* nor the *Schleier* court address the question of ambiguity," this Court in *Schleier* is adamant that the meaning of the statute is plain and unambiguous. In at least four different instances in the *Schleier* decision, this Court makes that declaration: "In our view, **the plain language of the statute** undermines the respondent's contention," *Schleier*, 95-1 USTC ¶ 50,309 at 2,163. "In contrast, no part of respondent's ADEA settlement is excludable under the **plain language of § 104(a)(2)**," *Id.* at 2,164. "Respondent seeks to circumvent the **plain language of**

§ 104(a)(2) by relying on the Commissioner's regulation interpreting that section," *Id.* at 2,165. **"In sum, the plain language of § 104(a)(2), the text of the applicable regulation and our decision in *Burke* establish two independent requirements that a taxpayer must meet before a recovery may be excluded under** § 104(a)(2)," *Id.* at 2,167.

The majority opinion in *Schleier* makes no effort to interpret from extrinsic evidence but relies upon the *plain language* and the "default rule" for the meaning.

> We have also emphasized the corollary to § 61(a)'s broad construction, namely, the 'default rule' of statutory construction that exclusions from income must be narrowly construed.

Id. at 2,163.

This threshold determination in *Schleier* of an *unambiguous* statute is contrary to the holdings in the appellate decisions upon which the Tenth Circuit relies: *Miller*, *Hawkins*, *Wesson*, and *Reese*. Only the Court of Claims in *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994), 94-1 USTC ¶ 50,232 (Fed. Claims 1994), found the statute *unambiguous* and determined, as this Court did in *Schleier*, that the plain and unambiguous meaning prohibited the exclusion to punitive damages. The Circuit Court of Appeals for the Federal Circuit *affirmed* the holding that the damage award was not excluded. However, the Federal Circuit *firmly reversed* the Court of Claims in regard to the finding of ambiguity. "The language 'on account of' is not free of ambiguity; rather, it is susceptible of at least two conflicting interpretations," *Reese*, 24 F.3d at 230. The Federal Circuit then applied the "default rule."

There are other courts which have found, as this Court did in *Schleier*, that this statute is *unambiguous*. Each of these courts, however, applied the "plain meaning" to hold that the punitive damage, or liquidated damage award is excluded by § 104(a)(2). *Burford*, 642 F. Supp. 635 (N.D. Ala. 1986); *Horton*, 100 T.C. 93 (1993); *Horton*, 33 F.3d 625 (6th Cir. 1994); *O'Gilvie*, 92-2 USTC ¶ 50,567 (D. Kan. 1992); *Hawkins*, 93-1 USTC ¶ 50,208 (D. Ariz. 1993); and *Miller*, 93 T.C. 330 (1989).

While both the Sixth Circuit in *Horton*, 33 F.3d 625, and the Tax Court in *Horton*, 100 T.C. 93, agree with this Court in *Schleier* that the meaning is *plain*, the decisions of those courts are at odds. The Tax Court and the Sixth Circuit applied the *plain meaning* of the statute to exclude from taxation all damages that flow from a tort claim for personal injury, including punitive damages. This Court in *Schleier* applied the *plain meaning* to tax punitive damages.

This Court in *Burke* found the meaning of the statute *ambiguous*, applied proper methods of statutory construction and determined that the interpretation expressed in the Treasury Regulation § 1.104-1(c) was intended. *See Burke*, *id.* at 1,870, and *Schleier*, 115 S. Ct. at 2,172 (O'Conner, J. dissenting). Although the facts and the question were virtually identical in *Burke* and *Schleier*, this Court did not mention application of two interpretations or tests from the same words in *Burke*. Instead, this Court gave approval to the *interpretation* expressed in the Treasury Regulation. *Burke*, 115 S. Ct. at 2,166. In *Schleier*, the Treasury Regulation has lost its status as a valid interpretation and has been relegated to the position of a requirement "in addition to" the statutory requirement. No consistent methodology can be derived from this caselaw and no logical results can be achieved.

III.

THE TENTH CIRCUIT HAS ENTERED A DECISION THAT IS IN CLEAR CONFLICT WITH THE ENACTING CONGRESS' ORIGINAL INTENT OF THE MEANING OF THE WORDS OF THE REVENUE ACT OF 1918 SECTION 213(b), THE DIRECT PREDECESSOR OF I.R.C. § 104(a)(2).

The Tenth Circuit *states* that the Sixty-Fifth Congress wrote the words of § 213(b) of the Revenue Act of 1918 to exclude "any damages" because Congress believed those amounts were not within the definition of gross income. The Tenth Circuit quotes the legislative history which specifically indicates that the bill which was enacted as § 213(b) provided that such amounts *shall* be excluded from gross income:

> Under present law it is doubtful whether amounts received throughout accident or health insurance, or under workman's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income. *The proposed bill provides that such amounts shall not be included in gross income.*

H.R. Rep. No. 767, 65th Cong. 2d Sess. 9-10 (1918) (*Quoted in Reese*, 24 F.3d at 233) (Emphasis added).

O'Gilvie, 95-2 USTC ¶ 50,508 at 89,639. This doubt whether such amounts were required to be included in gross income extended to punitive damages as well. *Commissioner v. Glenshaw Glass*, 348 U.S. 426, 75 S. Ct. 473, 211 F.2d 928

(1955), *reh'g denied*, 349 U.S. 925 (1955); *Downey*, 97 T.C. 150 at 4396. The Congressional enactors were well aware that punitive damages existed as part of the broad range of damages awarded in tort claims. *Burke*, 112 S. Ct. at 1871. The definition of income was not an obscure issue in 1918 when this statute was originally enacted. In 1894, the income tax act had been declared unconstitutional based on the definition of income. In the 1913 federal income tax law, the definition for net income included the phrase "and any income derived from any source whatever." Federal Income Tax Law of 1913, Section B, lines 1-19. The Sixteenth Amendment to the Constitution which was ratified in 1913 empowered Congress "to tax and collect taxes on incomes from whatever source derived." Whether these amounts excluded under § 104(a)(2) were income was an issue that would be the subject of litigation over the next eight decades. Shortly after the enactment of § 213(b) this Court's decision in *Eisner v. Macomber*, 252 U.S. 189, seemed to indicate that such amounts were not income. That assumption was eroded in subsequent years with *United States v. Kirby Lumber*, 284 U.S. 1 (1931); *Helvering v. Bruun*, 309 U.S. 461 (1940); and *Glenshaw Glass*, *supra*. Whether the individual members of the Sixty-Fifth Congress believed the amounts to be income is not certain and can never be known. If that Congress believed the amounts were income, or if they were unsure, then they resolved the issue with the words they wrote.

Even if Congress believed those amounts were not income, they enacted that belief into law. The Sixty-Fifth Congress drafted the original statute to *deny* the exclusion to damages for contract claims and for property tort claims. The exclusion, by its express terms, was intended only for damages received for personal tort claims. Section 213(b) of the Act provided that gross income does not include:

(6) *Amounts received*, through accident or

> health insurance or under workman's compensation acts, *as compensation for personal injuries or sickness, plus* the amount of *any damages received whether by suit or agreement on account of such injuries or sickness.*

(Emphasis added).

Note the drafting dilemma the enactors confronted: The second sentence could have been written "plus any damages received in a suit *for such injuries or sickness.*" Then "for such injuries" would unambiguously modify "suit." But when adding the idea of permitting the exclusion for agreements made "on account of such injuries," the drafters could not write "plus the amount of any damages received whether by suit or agreement for such injuries." The grammar didn't work; it was not the intent to exclude damages where the party agreed to the injury in advance. *See Erlich v. Higgins*, 52 F. Supp. 805 (S.D.N.Y. 1943); and *Starrels v. C.I.R.*, 304 F.2d 574 (1962). The words "on account of" were the accommodation the drafters had to make in order to grant the exclusion to awards made by agreements as well as by suits.

That enacting Congress did not express a limit to the *type of damages* that were excluded in the statute, only to the *type of claim* from which the damages arose. The use of the word "any" before damages does not limit damages. An example is illustrative. The first section of the first article of the United States Code gives the following guidance: "In interpreting the meaning of any Act of Congress, unless the context indicates otherwise, word importing the singular apply to several persons, parties, or things." 1 U.S.C. § 1. "Any" is a singular adjective. *Webster's Ninth New Collegiate Dictionary* (1987). "All" is a plural adjective. *Id.* Just as "any" Act of Congress means "all"

Acts of Congress in 1 U.S.C. § 1, "any" damages received means "all" damages received in § 104(a)(2). Applying 1 U.S.C. § 1 to the words in § 104(a)(2) "any damages received" means "*all* damages received" when such damages are awarded in an action for personal (physical) injury or received by agreement on account of that personal injury.

If the enacting Congress believed the amounts excluded were *not* income, as the Tenth Circuit in *O'Gilvie*, the Fourth Circuit in *Miller*, and the Tax Court in *Downey* have stated, then the courts have vitiated the original intent of the enacting Congress by the finding that the enacting Congress was under a "mistaken belief" about the law. These courts which adopted the *revised* intent theory found that the words "any damages . . . received on account of personal injury" do not now mean what the Congressmen who wrote them thought they meant. This reinterpretation of "original intent" is untenable. A "mistake" of law or a change in the understanding of the law that occurred more than 66 years after the enactment did not alter or revise that original intent.

The proper inquiry is: "*What did the original enactors intend those words to mean when they wrote them?*" *Those words* at that time were *intended* by the Sixty-Fifth Congress to exclude *all* damages. Perhaps, Congress wrote those words *because* they did not believe those awards were includable in gross income. But there can be no doubt that, at that time, those words were written ***to exclude*** *any* damages awarded in personal injury cases.

Congressmen of that Sixty-Fifth Congress, if asked in 1919 what was intended by those words, would have answered, "The words exclude any and all damages, including punitive damages." If the Judges and Justices making the decision were taken back to 1920, nearer to the time of enactment, and asked the

question they are being asked today, "What do these words mean?" they would find, as a matter of law, that any and all damages, including punitive damages, are excluded by the words of the statute. This was the IRS' understanding of the original statute. *Burke*, 112 S. Ct. at 1,875.

The distinction between *amounts received as compensation* and *any damages* is clear in both the wording of the original statute and in the 1933 Treasury Regulation which interprets that original enactment. Treas. Reg. 77, Art. 82 (1933). In the first phrase of the original statute and the first sentence of the 1933 Treasury Regulation, the "amounts received . . . as compensation for personal injuries . . ." are in clear contrast to the second phrase of the original statute and the second sentence of the Treasury Regulation "any damages recovered . . . on account of such (personal) injuries." This Treasury Regulation from 1933 articulates the interpretation that "on account of personal injury" defines the *type of tort claim*.

With the enactment of the Internal Revenue Code of 1939, the exclusion, now found at § 22(b)(5), was given the special scrutiny of Congress. A limitation to the exclusion was added in regard to the deduction for medical expenses under § 23(x) (now I.R.C. § 213). § 22(b)(5) of the Internal Revenue Code of 1939 repeated the exclusion found in § 213(b)(6).

The absence of explanation in later Treasury Regulations would indicate that the law was thought clear enough to require no explanation. (Treas. Reg. 86 (1935), Treas. Reg. 94 (1936), Treas. Reg. 111 (1943), and Treas. Reg. 118 (1953) contain no administrative interpretation of § 22(b)(5)). Knickerbocker, *The Income Tax Treatment of Damages: A Study in the Difficulties of the Income Concept*, 47 Cornell L.Q. 429, 436-40 (1962).

In 1954, Congress again enacted a new revenue code in

which the two clauses of § 22(b)(5) were separated by placing the provisions relating to the exclusion of workman's compensation payments, accident and health insurance proceeds in the new § 105 and the provisions for exclusion of damages received on account of "such" injuries in the new § 104(a)(2). The second clause of the original statute had been dependent upon the first clause for its full meaning. Upon this separation, new Treasury Regulations for § 104(a)(2) were issued in 1956 to clarify the meaning of the newly separated "any damages received" phrase. The new Regulation defines "damages" in this context as "an amount received (other than workman's compensation) through prosecution of a legal suit or action based upon tort or tort-type rights, or through a settlement agreement entered into in lieu of such prosecution." Treas. Reg. § 1.104-1(c) (1956). This Treasury Regulation preserves the meaning once supplied by the first phrase of the original statute. The Treasury regulation is an integral part of the meaning of the original enactment which was made necessary by the separation of the two *phrases* of the statute.

The significance of these later Congresses' reenactments of the section virtually unchanged is that the authority of those later Congresses is added to the authority of the enacting Congress to approve of the exclusion for "any damages received," including punitive damages, in cases where the underlying claim is a personal tort.

The decision of a later court can not reform "original intent," yet the IRS has cited *Glenshaw Glass*, *supra*, as primary support for the proposition that § 104(a)(2), previously § 213(b)(6), does not exclude punitive damages. *Glenshaw Glass* does not mandate taxation of all punitive damages in all events. The genius of *Glenshaw Glass* is that punitive damages are income and, *unless otherwise specifically excluded*, taxable. In the words of the majority in *Glenshaw Glass*, some exclusion of

punitive damages is anticipated. It is *this very exclusion*, in what is now § 104(a)(2), that is anticipated, for there is no other exclusion of punitive damages found in the Internal Revenue Code. *Glenshaw Glass* does not suppress or transform the "original intent" of the enacting Congress. *Glenshaw Glass* acknowledges and confirms the specific exclusion for these punitive damages.

After the *Glenshaw Glass* decision in 1955, the Internal Revenue Service, Congress, and the courts *continued* to approve the original codification which excluded all damages. Exclusion of punitive damages recovered in personal injury claims under § 104(a)(2) was an established administrative practice of the IRS for 66 years from the enactment of § 213(b) in 1918 until 1984. (*See* Rev. Rul. 58-578, 1958-2 C.B. 38; Rev. Rul. 75-45, 1975-1 C.B. 47; Gen. Couns. Mem. 35,967 (August 27, 1974); Priv. Ltr. Rul. 7304120600A (April 12, 1973)).[1] These long-standing established administrative practices describe the meaning of the statute as limiting the *type of tort claim*. These administrative statements came after 1955 when the IRS was well aware of the significance of *Glenshaw Glass*, that punitive damages were income, unless otherwise excluded.

Treasury Regulation § 1.104-1(c) (1956) had been in effect for 28 years before Rev. Rul. 84-108 was published by the Commissioner, and not until after this Court's decision in *Burke* in 1992, had the IRS or any court ever suggest that the statute created two tests. Treasury Regulation § 1.104-1(c) is the expression of one interpretation, long recognized as the correct interpretation.

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1. The General Counsel memorandum and the Private Letter Ruling are not cited nor relied upon as precedent. I.R.C. § 6110(j)(3). Both documents, however, are competent evidence of administrative practice. *Rowan Cos. v. United States*, 452 U.S. 247, 261 n. 17, 68 L. Ed. 2d 814, 826 n.17 (1981).

The government adhered to the "original intent" of the statute and 19 years after *Glenshaw Glass* described the *plain meaning* and the established administrative practice in General Counsel Memorandum 35,967 (August 27, 1974) which expressed the interpretation of this structurally ambiguous statute of limiting the *type of tort claim* only:

> . . . I.R.C. § 104(a)(2) is a specific statutory exclusion from gross income within the "except as otherwise provided" clause of I.R.C. § 61(a). . . . Therefore, under I.R.C. § 104(a)(2), *any damages, whether compensatory or punitive and whether a substitute for income or not*, received on account of personal injury or sickness are excludable from gross income. . . . *There is nothing in the legislative history of I.R.C. § 104, or the regulations thereunder indicating that punitive damages awarded in connection with personal injuries should be includable in gross income.*

(Emphasis added).

Twenty years **after** the decision in *Glenshaw Glass*, the Commissioner of the Internal Revenue continued to adhere to the established interpretation of the statute in Revenue Ruling 75-45:

> Therefore, under § 104(a)(2) any damages, whether **compensatory or punitive**, received on account of personal injuries or sickness are excludable from gross income.

(Emphasis added). Rev. Rul. 75-45, 1975-1 C.B. 47. The

Treasury Regulation § 1.104-1(c), these official statements by the IRS, the General Council's Memorandum, *supra*, and Rev. Rule 75-45, define the meaning of the statute at a time closer to its enactment, and evidence a continued adherence to the understood and established interpretation.

The enactor's original intent cannot be reformed administratively 66 years after the enactment. However, the actions and knowing approval of subsequent Congresses, especially in the wake of the significant change in the understanding of the law brought about by *Glenshaw Glass*, are properly regarded as the intent of those Congresses. *See Crane*, 675 S. Ct. at 1051; *Burke*, *supra*. Section 104(a)(2) has been re-enacted without material change repeatedly throughout the last 78 years. *Reese*, 24 F.3d 228 (Fed. Cir. 1994), note 2. Re-enactment and amendment to the statute without change is the *most authoritative evidence of Congressional approval* of the long standing administrative interpretation of the statute as excluding punitive damages. *Eli Lilly v. EPA*, 615 F. Supp. 811 (S.D. Ind. 1985); *Massachusetts Mutual, Life Ins. Co. v. United States*, 5 Cl. Ct. 581 (1984), *aff'd*, 761 F.2d 666 (Fed. Cir. 1985); and *Crane v. Commissioner*, 331 U.S. 1 (1947).

From the time of the original enactment of § 213(b)(6) in 1918 until the publication of Revenue Ruling 84-108 in 1984, 66 years passed during which the statutory provision was not altered with the *enactment* of nine subsequent Revenue Acts. Section § 104(a)(2), *with the relevant language unchanged*, was adopted into the 1939 and 1954 Codes. Treasury Regulation § 1.104-1(c), which pertains precisely to this provision, was adopted in 1956, and approved by Congress by those *re-enactments*.

Congress *amended* § 104 three times in the nine years following the publication of Rev. Rul. 75-45. (*See* Pub.L.No. 94-

455, § 505(e), 1901(a)(17) (adding a new subsection to § (a)); Pub. L. No. 96-465, § 2206(e)(1) (giving effect to the Foreign Service Act of 1980); and Pub. L. No. 97-473, § 101(a) (enlarging the scope of subsection (a)(2) by adding to that exclusion what would otherwise be the taxable interest component of "structured settlements").) Although the very subsection at issue was amended after the publication of Rev. Rul. 75-45 and *attention to the interpretation of the exclusion was necessary*, Congress did not change the interpretation of the Treasury Regulation nor the pertinent holding of the Rev. Rul. 75-45 in any one of these amendments. The exclusion of punitive damages was a prior long-standing and consistent administrative practice embodied in the holding of Rev. Rul. 75-45 and in Treasury Regulation § 1.104-1(c).

In 1989, Congress once again considered § 104(a)(2) and *acted* to limit the exclusion of punitive damages to awards in connection with physical injury or physical sickness only. This Court in *Burke* acknowledged and validated that change in 1992. *Burke*, 112 S. Ct. at 1871 note 6, and 1876 note 3 (Scalia, J. concurring).

In 1984, the Commissioner, without impetus from court decision, Congressional act, or other relevant source, reversed his administrative position on the exclusion of punitive damages in Rev. Rule 84-108. Even then, the IRS did not suggest the idea that there were two tests for excludability in § 104(a)(2), only that the more restrictive test applied.

In 1995, without a review of the long history of Congressional action and acquiescence with regard to this statute, the Tenth circuit joined the Ninth Circuit in its opinion that Congress did not know what it was doing when it enacted the Amendment to § 104(a)(2). The Ninth Circuit in *Hawkins* asserted "... the views of a subsequent Congress form a

hazardous basis for inferring the intent of an earlier one." *Hawkins*, 30 F.3d at 1,082. The corollary to that principle is even more apt. ***The view of a subsequent Commissioner involved in litigation forms an even more hazardous basis for inferring the intent of Congress.***

In view of the plain language of the original statute, the contemporaneous statements of intention by the enacting Congress, the extant Treasury Regulation, the long standing administrative practice, and the knowing approval and amendments of many Congresses, such a change by the Commissioner is an unwarranted administrative legislation. *See Burford*, 642 F. Supp. 635. The Tenth Circuit has gravely misplaced its allegiance when it gives greater weight to the litigation position of the IRS than to the continuing acts and acquiescences of the governmental body charged with making the laws.

Can the intent change after enactment when the words do not change? If no, then the *original intent* of the enacting Congress, although perhaps based on an incorrect legal fact, is still that *any and all* damages are excluded. If the meaning evolves, then the intention of the subsequent Congresses, including the Congress which enacted the 1989 Amendment, is of greatest relevance to the inquiry and not to be summarily dismissed. *Hawkins*, 30 F.3d, at 1086 (Trott, J. dissenting).

As the Tenth Circuit has aptly noted, the courts have not applied the *revised original intent* to limit the *type of damages* to prohibit exclusion of the awards for lost wages, business losses, or losses as the result of injury to personal and business reputation, notwithstanding the fact that these awards are now known to be "otherwise taxable" as well.

> [T]his rational [of an underlying

> compensatory purpose] is somewhat problematic. If . . . a plaintiff recovers for wages lost due to his being injured in an accident, that amount would be excludable from gross income under § 104(a)(2), and thus not taxable. But if he had actually worked, his wages would be reportable income subject to taxes; thus the § 104(a)(2) exclusion has made him more than whole.

O'Gilvie, 95-2 USTC ¶ 50,508 at 89,640.

Under the weight of the caselaw, that meaning "intended" by Congress in 1918 in the words of § 213(b)(6), which expressly exclude any damages if received for a tort claim, cannot properly be reformed to exclude only those awards which are compensatory.

IV.

THE RATIONALE UNDERLYING THE DECISION OF THE TENTH CIRCUIT IS CONTRARY TO AND OVERRULES A LONG LINE OF SETTLED CASE LAW THAT HAS BEEN RELIED UPON BY TAXPAYERS, COUNSEL, TAX ADVISORS, AND THE IRS TO INTERPRET I.R.C. § 104(a)(2). SUCH RATIONALE APPLIES A "COMPENSATORY PURPOSE" TEST REJECTED BY THOSE CASES.

The case law has been sparse regarding the exclusion of punitive damages awarded in actual physical injury cases. Only *Burford*, *Horton*, and *O'Gilvie* have dealt with physical injury. However, the case law with respect to the interpretation of § 104(a)(2) at issue here has been voluminous. (*See Summary of Cases*, Petition for Writ of Certiorari appendix at 46). And, until

Miller, supra, the courts had consistently rejected the "compensatory purpose" test and the "return of capital" rationale.

The IRS first argued in 1972 that only awards which were in the nature of a *return of capital* were excludable. Taxpayers were asking that lost wages awarded because of their personal injuries be excluded from income under § 104(a)(2). The IRS argued that the award for lost wages was made to compensate for the economic loss and not as compensation for the personal injury. The courts repeatedly rejected the interpretation that § 104(a)(2) prohibited the exclusion because of the *type of damages* and further rejected the proposition that exclusion under § 104(a)(2) is limited to damages which are compensatory or are a *return of capital.*[2] **In no reported decision has the fact that an award for lost wages or economic losses is not a return of capital prevented exclusion under § 104(a)(2) where the underlying claim was for personal injury.** These courts note that, without a specific exclusion, these items would be taxable, but consistently find that § 104(a)(2) provides the required specific exclusion. Under the weight of these cases, which hold awards of lost profit and wages excludable, although those awards are ***not a return of capital***, the assertion that the statute has an underlying "compensatory" purpose is insupportable. The test that requires that result must be rejected.

The next spate of cases came as the result of the IRS seeking to limit the *type of damages* excluded to only awards for *physical*

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2. *Seay*, 58 T.C. 32 (1972); *Wolfson*, 651 F.2d 1228 (6th Cir. 1981); *Church*, 80 T.C. 1104 (1983); *Roemer*, 716 F.2d 693 (9th Cir. 1983); *Threlkeld*, 848 F.2d 81 (1988); *Metzger*, 88 T.C. 46 (1988); *Bent*, 835 F.2d 67 (3rd Cir. 1987); *Wulf*, 883 F.2d 842 (10th Cir. 1989); *Thompson*, 866 F.2d 709 (4th Cir. 1989); *Byrne*, 883 F.2d 211 (3rd Cir. 1989); *Rickel*, 900 F.2d 655 (3rd Cir. 1990); *Redfield*, 940 F.2d 542 (9th Cir. 1991); *Pistillo*, 912 F.2d 145 (6th Cir. 1990); *Downey*, 97 T.C. 10 (1991); *Burke*, 929 F.2d 1119 (6th Cir. 1991); *Rice*, 834 F. Supp. 1241 (E.D. Cal. 1993); *McKay*, 102 T.C. 16 (1994); *Bennett*, 94-1 USTC ¶ 50,044 (1994).

injury. The IRS asked the courts to read the "on account of personal injury" portion of the phrase to mean "as compensation for *physical* injuries" only. *Roemer*, 716 F.2d 693; and *Threlkeld*, 848 F.2d 81. Thus the IRS argued that the exclusion was not available for economic loss, such as loss to reputation, etc., because the injury was not physical. *Wolfson*, 651 F.2d 1228; *Church*, 80 T.C. 1104; *Roemer, supra*. These attempts to limit the *type of damages* excluded by the words "on account of personal injury" were rejected. These courts rejected the "compensatory purpose" test which limited the *type of damages* excluded, and uniformly held that once the "underlying claim" for personal injury was found, then *all* damages which flowed from that claim are excludable. The statute was consistently interpreted to apply only the "nature of the underlying claim" test as the beginning and the end of the inquiry. *Burke, supra*; *Threlkeld, supra*; *Horton, supra*.

The *type of tort claim is* limited by the language of the statute: A *personal injury* tort must be found to be the underlying claim before the exclusion for any damages is granted. The wording of the original statute carefully denies the exclusion to damages for contract claims and property tort claims. The exclusion, by its express terms, was intended for all damages received only for personal tort claims. It would have been reasonable to interpret "*personal* injuries or sickness" as "*physical* injuries or sickness" and further limit the *type of underlying tort claim* that would be necessary to qualify for the exclusion. However, throughout the long administrative practice from 1918 until 1985, that distinction has not been made. The caselaw definition of personal tort to include torts for non-physical injury was also a reasonable, if generous, interpretation. In its litigation efforts, the IRS has argued that the language "on account of personal injury" required inquiry into the *type of damages*, instead of inquiry into the *type of the underlying claim*. The courts have never before been asked to

address whether the phrase "on account of personal injuries and sickness" which properly limits the *type of claim*, was intended to further limit the *type of claim* to only those claims for *physical* injury and sickness.

Just as the decisions in *Threlkeld* and *Burke* were beginning to narrow the areas of uncertainty, the comments in *Schleier* regarding application of a "compensatory purpose" test have again generated confusion. The application of a "compensatory purpose" test and the rationale of "return of capital" in *Schleier* to limit the *type of damages* excluded indicates that the lower courts decisions in all the preceding cases where the IRS argued for application of the "compensatory purpose" test have been wrongly decided. In each case, those courts determined that there was only one test and that test was the "nature of the underlying claim" test. Petitioner respectfully asks this Court to reject the interpretation that the words "on account of personal injury" limit the *type of damages*, and adopt the interpretation that the words "on account of personal injury" limit the *type of tort claim*.

V.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS INTERPRETED A FEDERAL STATUTE, I.R.C. § 104(a)(2), IN SUCH A MANNER THAT THE 1989 AMENDMENT TO THAT STATUTE IS RENDERED MEANINGLESS.

The inescapable conclusion of the Tenth Circuit's decision in *O'Gilvie*, *supra*, is that § 104(a)(2) exempts no punitive damages at any time. Thus the statute, as amended, is declared void on its face as to exclusion of punitive damages. However, it is evident from the text of the amendment that Congress believed that the statute exempts not only *non-physical damages* received

on account of personal injuries, but also exempts *punitive damages* received on account of personal injuries. Even the closest reading reveals that the language of the 1989 amendment is *limiting* only:

> Paragraph (2) shall not apply to any punitive damages in connection with a case *not* involving physical injury or physical sickness.

(Emphasis added). Section § 104(a)(2). There are no words in the amendment which increase, enlarge, or expand the exemption in paragraph (2). The careful, if awkward, wording of the amendment demonstrates the intention of Congress to leave undisturbed the meaning of paragraph (2) in the prior statute.

O'Gilvie supplies the first instance in which punitive damages for physical injury care were found not to be excluded and the amendment to the statute is directly shown to be meaningless. In *Hawkins*, 30 F.3d 1077, the punitive damages award was made for breach of good faith, not for physical injury. In *Reese*, 24 F.3d 228, the punitive damages award was for sexual harassment. The other physical injury cases, *Burford* and *Horton*, are in accord with the express meaning of the 1989 Amendment. *O'Gilvie* is the only physical injury case which prohibits the exclusion to the taxpayers. The amendment to the statute limits the exclusion under § 104(a)(2) to only punitive damages awarded in connection with physical injury. If the Tenth Circuit is followed, those punitive damages were not excluded anyway and the amendment is inoperative and invalid. The Tenth Circuit does not resolve the "troubling" issue of the 1989 Amendment but, in effect, states that Congress didn't know what it was doing.

The taxpayer directs the Court's attention to the 1989

Amendment of § 104(a)(2) to clarify and illuminate the prior law, not for retroactive application of the statute. This use of subsequent enactment of a statute is approved and demonstrated in *Burke, supra*; the 1899 case, *Hamilton*, 175 U.S. 414 (1899); and in *United States v. Community TV, Inc.*, 327 F.2d 797 (10th Cir. 1964).

In *Community TV*, the Tenth Circuit examined a 1959 amendment to an excise tax statute to find the meaning of the statute prior to the amendment. For purposes of taxing microwave transmissions, a 1958 transaction was before the court. Based upon a detailed comparison of prior statute and the 1959 amendment, the Tenth Circuit held that the 1958 transaction was not subject to tax.

This use of subsequent enactment to interpret current law was applied by this Court in *Hamilton, supra*. In interpretation of a statute enacted in *1869*, this Court in the majority opinion states that an act approved in 1896 ". . . bear[s] upon the proper construction of this section."

This Court in *Burke*, 112 S. Ct. 1869, examined the 1989 amendment to § 104(a)(2) to determine the meaning of the prior statute which applied when the case was brought in 1984. Justice Blackmun states:

> The enactment of this limited amendment addressing only punitive damages shows that Congress assumed that other damages (i.e. compensatory) would be excluded in cases of both physical and nonphysical injury.

In the concurrence, Justice Scalia, joined by Justice Souter, examined the 1989 amendment to § 104(a)(2) to clarify the prior law. Justice Scalia wrote:

> Congress amended § 104(a)(2), 1989, to provide prospectively that § 104(a)(2) shall not shelter from taxation "punitive damages in connection with a case not involving physical injury or physical sickness." As thus amended it is clear (whereas previously it was not) that "personal injuries or sickness" includes not only physical, but also psychological harm or disease; nevertheless, the amendment does not require the phrase unnaturally to be extended to injuries that affect neither mind nor body.

Burke, 112 S. Ct. at 1876, n. 3. The use of the later-enacted amendment, in an appropriate case, to illuminate the meaning of the prior statute is approved and demonstrated by this Court in *Hamilton* and *Burke*. **The use of a subsequent amendment to illuminate the meaning of a prior statute assures clear and consistent interpretation and application of that statute over time.**

The Tenth Circuit's offhand dismissal of the importance or significance of the "belief" of the Congress making the 1989 amendment is astonishing. The "belief of Congress" as to the meaning of statutes at the time they are enacting or amending those statutes is the essence of Congressional intent.

A subtle tendency pervades the decision of the Tenth Circuit that, in order to do good, the court will place the authority of the federal courts above the authority of Congress to make laws. Application of a "default rule" in favor of the government

instead of seeking the intent of Congress in the ample extrinsic evidence, the diminishment of the significance and authority of Congressional reenactment of the statute without material change from 1918 until 1989, the disregard of the strong Congressional policy, evident throughout Part III of the Code, to benefit the injured and bereaved, the willingness to eviscerate an actual Congressional amendment to the statute, are each evidence of this underlying tendency. Justice Louis Brandeis counsels vigilance against such encroachment:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 471 (1928).

VI.

THE TENTH CIRCUIT HAS IMPERMISSIBLY EXPANDED THE POWER OF THE FEDERAL DISTRICT COURT TO MODIFY ITS JUDGMENTS BEYOND THE AUTHORITY GRANTED BY THE FEDERAL RULES OF CIVIL PROCEDURE.

There is no doubt that the government was entitled to the extended period of sixty (60) days under Fed. R. Civ. P. 4(a) in which to file its notice of appeal. However, the judgment from which it sought to appeal was filed on November 30, 1993, and was amended under Rule 60(a) on December 7, 1993. Amendment of a judgment under Fed. R. Civ. P. 60(a) does not

toll the time for filing the notice of appeal. The Tenth Circuit states without analysis or reference to statutory authority that the government's cross appeal is filed timely. *O'Gilvie*, 66 F.3d 1550 (10th Cir. 1995), 95-2 USTC ¶ 50,508. (Petition for Writ of Certiorari appendix at 8). Under no analysis is the Tenth Circuit correct in its holding.

Two questions had to be answered to determine jurisdiction. First, under what authority did the district court make its December 7, 1993 "amendment" to the judgment entered on November 30, 1993? Second, was the time for filing notice of appeal tolled under this authority?

The Federal Rules of Civil Procedure authorize the correction or amendment of a judgment in only certain instances: Rules 52, 59(e), 60(a), and 60(b). (Petition for Writ of Certiorari appendix at 41, 43, and 44). Rules 52, 59(e) and 60(b) require a motion by a party to amend a judgment. Rule 60(a) corrections may be made upon motion, but motion of a party is not required. No motion for amendment was made by either party. *Only* Rule 60(a) authorizes the correction of judgment on the court's own initiative. Such is the case here. In fact, the only errors in a judgment which a district court ***may*** correct of its own initiative are those errors arising from clerical mistakes and from oversight or omission as sanctioned by Rule 60(a). The court's omission in this case of the previously withdrawn decision in this case is the precise type of oversight or omission contemplated by Rule 60(a).

All parties were on prior notice of the decision of the court on that omitted portion of the November 30, 1993 decision. The court had issued **Judgment** on August 26, 1992 concerning the first issue which was withdrawn "subject to reinstatement at the conclusion of the case" on October 27, 1992. (Petition for Writ of Certiorari appendix at 30). The **Memorandum and Order**

filed with the **Judgment** on November 30, 1993 expressly stated in its introductory paragraph the result and holding of its clerical omission:

> In a previous opinion, this court held O'Gilvie's punitive damages award was excludable from income tax pursuant to § 104(a)(2) of the Internal Revenue Code.

(Petition for Writ of Certiorari appendix at 31). There was no doubt in the mind of the parties or the court that the district court had made a clerical error, nor was there any doubt concerning the substance of the court's decision.

Additionally, the decision in the November 30, 1993 **Judgment** was *absolutely dependent* upon the outcome of the first. The first determination, that punitive damages were excluded, was essential to the determination of the second issue of whether the "additional amount" was an additional punitive damage award and, therefore, also exempt from tax under § 104(a)(2). If the punitive damage award was taxable, then the "additional amount" would have been taxable in all events whether characterized as interest or additional punitive damage award. The parties were well aware that the decision in favor of the taxpayer on the first summary judgment issue of taxability of punitive damages was essential to the justiciability of the second summary judgment issue. The court's correction to include the omitted portion did not change the decision, but clarified what was understood by all parties to be what the court intended to say. *Blanton v. Anzolone*, 7 Fed. Rules Serv. 3rd 1461, 813 Fed. 1574 (9th Cir. 1987).

Rule 60(a) makes no provision for tolling the period of time for parties to file appeals because of the court's correction. *Miller v. Transamerican Press, Inc.*, 37 Fed. Rules Serv. 2d 850,

709 F.2d 524 (9th Cir. 1983). The district court corrected its omission on December 7, 1993 before either appeal was docketed in the appellate court.

The defendant's notice of appeal, filed on February 1, 1994, was filed more than sixty days from the date of final judgment on November 30, 1993. The court, on its own initiative under the authority of Rule 60(a), clarified what was understood by all parties to be what the court intended to say. Correction of the November 30, 1993 **Judgment** by the court on its own initiative under Rule 60(a) does not toll the period for filing an appeal. Defendant's appeal was not timely filed.

The determination by the Tenth Circuit that no statutory authority is required for amendment of a clerical error impermissibly expands the power and authority of the district court to alter and amend its decisions.

CONCLUSION

Petitioner Kelly M. O'Gilvie respectfully prays that this Court determine that the federal district court had authority to amend its judgment of November 30, 1993 on its own initiative exclusively under Federal Rule of Civil Procedure 60(a) and that because the Rule 60(a) does not toll the time for the IRS to appeal beyond 60 days, the notice of appeal filed by the IRS on February 1, 1994 was not timely filed, therefore, the Tenth Circuit did not gain jurisdiction to hear the appeal in *O'Gilvie*.

In the alternative, Petitioner respectfully requests that this Court find that the federal courts may not neglect their duty to fully interpret ambiguous federal statutes to determine the intent of Congress by resorting to a comprehensive review of all relevant extrinsic evidence. Additionally, the Petitioner asks that this Court find § 104(a)(2) to be structurally ambiguous and to

choose between the two competing interpretations. Petitioner request that this Court find that the words of the original statute unambiguously show the intent of the enactors of § 213(b)(6), precursor of § 104(a)(2), to exclude all damages, including punitive damages, received in a suit where the underlying claim is a personal injury tort, the death of the Petitioner's wife. The Petitioner asks the Court to properly weigh the significance of the following: (1) the plain meaning of the original statute; (2) Treasury Regulation § 1.104-1(c); (3) the long-standing administrative practice; (4) the repeated re-enactments and amendments by Congress where attention to the meaning of the statute was necessary and where Congress left the relevant language unchanged; and (5) the extensive caselaw rejecting the "compensatory purpose" test, to find that the intent of the enacting Congress was to exclude any damages, including punitive damages, received in a suit for personal injury, the death of the taxpayer's wife.

Petitioner requests that the issue of whether the "additional amount" awarded as the result of an improper remittur order is an additional punitive damages award and therefore excluded from taxation under § 104(a)(2) which issue was not reached by the Tenth Circuit Court of Appeals be remanded for decision on the merits and treated in accordance with the decision of this Court.

Respectfully submitted,

LINDA D. KING
Counsel of Record
Attorney for Petitioner
Kelly M. O'Gilvie
6135 East Central
Wichita, Kansas 67208
(316) 686-2000

Supreme Court, U.S.
FILED
JUN 13 1996

Nos. 95-966 and 95-977

In the Supreme Court of the United States

OCTOBER TERM, 1995

KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE, MINORS, PETITIONERS

v.

UNITED STATES OF AMERICA

KELLY M. O'GILVIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

KENNETH L. GREENE
KENNETH W. ROSENBERG
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

49 pp

QUESTIONS PRESENTED

1. Whether a punitive damage award in a wrongful death action is excluded from gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)).

2. a. Whether the appeal by the United States from the judgment entered by the district court in the case brought by Kelly O'Gilvie (No. 95-977) was timely.

b. Whether the action filed by the United States for the recovery of an erroneous refund made to Kevin and Stephanie O'Gilvie (No. 95-966) was commenced within the time permitted by 26 U.S.C. 6532(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-966

KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE, MINORS, PETITIONERS

v.

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v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 66 F.3d 1550.[1] The opinion of the district court (Pet. App. 25a-27a) is reported at 71 A.F.T.R.2d 547.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1995. The petitions for writs of certiorari were filed on December 18, 1995, and were grant-

[1] "Pet. App." refers to the appendix to the petition in No. 95-966.

ed on March 25, 1996. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Kevin and Stephanie O'Gilvie are the children of petitioner Kelly O'Gilvie and of Betty O'Gilvie, who died in 1983 of toxic shock syndrome. On behalf of his wife's estate and his children, Mr. O'Gilvie brought a civil action against the manufacturer of the product that caused her death. The jury awarded petitioners actual damages of $1,525,000 and punitive damages of $10,000,000. The trial court remitted the punitive damage award to $1,350,000, but the full award was reinstated on appeal (Pet. App. 3a).

The judgment for punitive damages was paid and distributed to petitioners in 1988. Net of attorneys fees and expenses, Kevin and Stephanie O'Gilvie each received punitive damages in the amount of $1,241,823 and Mr. O'Gilvie received punitive damages in the amount of $2,483,646. Petitioners reported those amounts as income on their 1988 federal tax returns and paid the taxes due (Pet. App. 3a).

2. In 1989, Mr. O'Gilvie filed a claim for refund of the taxes he paid on the punitive damage award. He asserted that the award of punitive damages is excluded from gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)). When the refund claim was not granted, Mr. O'Gilvie commenced this refund suit against the United States in federal district court (Pet. App. 3a-4a).

Refund claims were also filed for Kevin and Stephanie O'Gilvie in 1989. They also asserted that the punitive damage award was not subject to tax

under Section 104(a)(2). The Internal Revenue Service approved and paid those refund requests on July 9, 1990 (Pet. App. 8a, 38a). On July 9, 1992, however, the United States commenced an action under 26 U.S.C. 7405(a) to recover these payments as erroneous refunds (Pet. App. 8a). That suit was filed in the same court in which Mr. O'Gilvie's action was pending. The parties stipulated in the children's case that "[t]here are no factual issues in dispute in this litigation" and that "[t]he sole legal issue in dispute between the parties is whether the punitive damages received by the defendants are excludable from income pursuant to 26 U.S.C. Section 104(a)(2)" (Pet. App. 39a). The parties in that case "therefore agree[d] to be bound by the final judgment of the district court" in Mr. O'Gilvie's case, subject only to the understanding that they would be permitted to appeal any adverse judgment "on the merits" and, on such an appeal, would also be permitted to contend that "they were not properly served with the summons and complaint * * * in accordance with Kansas law" (*ibid.*).

3. a. On May 26, 1992, the district court entered an order in Mr. O'Gilvie's refund suit holding that punitive damages do not represent compensation for an injury and are therefore not excluded from gross income by Section 104(a)(2). On a motion for reconsideration, however, the district court vacated its prior order, holding instead that punitive damages are excludable from gross income under Section 104(a)(2). An order entering judgment in favor of Mr. O'Gilvie on that claim was issued on August 26, 1992 (Pet. App. 5a).

An additional issue remained for adjudication in Mr. O'Gilvie's case. He contended that the post-trial in-

terest that he received on the portion of the judgment for punitive damages that had been remitted and then reinstated should be excluded from gross income under Section 104(a)(2). Because that claim had not been adjudicated, the district court entered an order on October 27, 1992, that withdrew the August 26 order "subject to reinstatement at the conclusion of the case" (Pet. App. 6a n.5). The district court thereafter entered an order on November 30, 1993, holding that such interest is taxable income and entering judgment in favor of the government on that issue at that time (*id.* at 5a-6a).

One week later, on December 7, 1993, the district court entered an "amended" and final judgment in Mr. O'Gilvie's case. That order (i) granted judgment in favor of Mr. O'Gilvie on his claim that the punitive damages award that he received was not subject to tax and (ii) granted judgment in favor of the government on Mr. O'Gilvie's claim that the interest he received was not subject to tax (Pet. App. 6a). On January 5, 1994, Mr. O'Gilvie filed a notice of appeal from the part of the judgment unfavorable to him. On February 1, 1994, the government filed its notice of appeal in Mr. O'Gilvie's case (*id.* at 7a).

b. Pursuant to the stipulation that had been entered in the companion case, the district court entered an order on February 22, 1994, dismissing the government's claim for recovery of the refund paid to Kevin and Stephanie O'Gilvie (J.A. 66a). The government filed a notice of appeal in that case, and the two cases were consolidated in the court of appeals (Pet. App. 2a, 7a).

4. a. On appeal, Mr. O'Gilvie asserted that the government's notice of appeal in his case was not timely because, even though it was filed within 60

days of the December 7, 1993, "amended" and final judgment, it was not filed within 60 days of the November 30, 1993, judgment that disposed of the interest issue only.

The court rejected petitioner's claim (Pet. App. 7a-8a). Noting that the August 26, 1992, judgment on the punitive damages issue had been vacated, and the November 30 judgment addressed only the interest issue, the court of appeals held that the December 7 judgment was the only judgment that disposed of both the interest and punitive damages issues and was therefore the only final judgment from which an appeal could be filed. The notice of appeal was filed by the government within 60 days of that judgment and was therefore timely (*id.* at 7a-8a).

b. On appeal, Kevin and Stephanie O'Gilvie sought to defend the judgment in their favor by raising a contention that they had waived in the district court. Under 26 U.S.C. 6532(b), "[r]ecovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund." The government's complaint was filed on July 9, 1992, and alleged that the Internal Revenue Service refunded the taxes at issue on July 9, 1990. Kevin and Stephanie O'Gilvie admitted those facts in their answer and in their stipulation and did not raise any defense based upon the statute of limitations (J.A. 64a; Pet. App. 38a).[2] In the court of appeals, however, they asserted that, although they received

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[2] They also stipulated in the district court that they would be bound by the judgment below and could raise on appeal only questions relating to "the merits" of the tax issue and a question as to whether personal service had been made on them "in accordance with Kansas law" (Pet. App. 39a).

the refund checks in the mail on July 9, 1990, the checks had been mailed earlier; they argued that a refund is made for purposes of Section 6532(b) when the check is mailed, rather than when it is received. Asserting that the "checks had to have been mailed before July 9, 1990" (Pet. App. 8a), they contended in the court of appeals that the government's suit was filed more than two years after the refund was made and was therefore untimely (*ibid.*).

The United States pointed out that the defense that Kevin and Stephanie O'Gilvie now sought to raise in the court of appeals had not been pled or raised in any fashion in the court below (U.S. Reply and Answering Br. at 1, 2). The court of appeals nonetheless addressed petitioners' new contention on the merits. Assuming that the new factual assertions proffered by petitioners were correct, the court of appeals held that the new legal contention that they raised was nonetheless invalid (Pet. App. 10a). The court noted that it has long been held that a tax refund is made "when the check in payment of the obligation is delivered" (*Paulson* v. *United States*, 78 F.2d 97, 99 (10th Cir. 1935)). The court observed (Pet. App. 9a) that this Court reached a similar conclusion in *United States* v. *Wurts*, 303 U.S. 414 (1938), which held that the issuance of a refund check does not itself constitute a "refund" because payment could be stopped and the check cancelled "even after a check was signed and mailed." *Id.* at 417-418. Because a "refund" is not made until the funds are received by the taxpayer, the court held that the government's suit was timely in this case (Pet. App. 10a).

c. On the merits of the substantive tax issue, the court of appeals reversed the district court. The court of appeals noted that four other circuits have

held that punitive damage awards in personal injury cases are not excludable from income under Section 104(a)(2) (Pet. App. 13a, citing *Wesson* v. *United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins* v. *United States*, 30 F.3d 1077 (9th Cir. 1994), cert. denied, 115 S.Ct. 2576 (1995); *Reese* v. *United States*, 24 F.3d 228 (Fed. Cir. 1994); *Commissioner* v. *Miller*, 914 F.2d 586 (4th Cir. 1990)). The court agreed with those circuits that the text of Section 104(a)(2)—which provides an exclusion from income only for damages received "on account of" personal injuries—is subject to more than one interpretation. It could be read to encompass any monetary award received in a personal injury suit; or, it could be read to refer only to damages awarded "on account of" the injury and not to damages awarded "on account of" the egregious or malicious nature of the conduct of the defendant (Pet. App. 17a). Concluding that the text and history of the statute do not resolve whether Congress intended to exclude punitive damages from income under Section 104(a)(2), the court applied the well-established rule that exclusions from income must be narrowly construed and held that punitive damages are therefore not excludable from income under Section 104(a)(2) (Pet. App. 22a, citing *United States* v. *Burke*, 504 U.S. 229, 248 (1992) (Souter, J., concurring)).

The court noted (Pet. App. 14a-16a) that the only circuit that has reached a different conclusion (*Horton* v. *Commissioner*, 33 F.3d 625, 630 (6th Cir. 1994)) erroneously relied on a rationale that this Court expressly rejected in *Commissioner* v. *Schleier*, 115 S. Ct. 2159 (1995). In *Horton*, the Sixth Circuit reasoned that, if "the underlying claim is one for a personal, physical injury," the "entire recovery is excludable" under Section 104(a)(2). 33 F.3d at 631. In

Commissioner v. *Schleier*, however, this Court stated that (Pet. App. 16a, quoting 115 S. Ct. at 2167):

> the plain language of § 104(a)(2), the text of the applicable regulation, and our decision in *Burke* establish two independent requirements that a taxpayer must meet before a recovery may be excluded under § 104(a)(2). First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is "based upon tort or tort type rights"; and second, the taxpayer must show that the damages were received "on account of personal injuries or sickness."

The court of appeals in *Horton* failed to address the statutory requirement that the damages to be excluded from income were received "on account of personal injuries" and "misconstrued *Burke* as holding that § 104(a)(2) required only that there be a tort-type injury" (Pet. App. 16a).

SUMMARY OF ARGUMENT

1. A punitive damage award in a wrongful death case is not excluded from gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness." 26 U.S.C. 104(a)(2). In *Commissioner* v. *Schleier*, 115 S. Ct. 2159, 2167 (1995), the Court held that a taxpayer must establish "two independent requirements" to qualify for the exclusion provided in Section 104(a)(2). First, the taxpayer must establish that the underlying cause of action giving rise to the recovery is based upon tort or tort type rights. That requirement is unquestionably met in a wrongful death case. Second, the taxpayer must establish that the damages were received "on account of" a personal

injury. That requirement is not met by a punitive damage award.

As this Court reasoned in *Commissioner* v. *Schleier*, *supra*, damages that are "punitive in nature," rather than compensatory, do not meet the statutory requirement that the damages be received "on account of" personal injuries or sickness. Damages that are "punitive in nature" are designed to punish the wrongdoer, not to compensate the plaintiff. Punitive awards are not awarded "on account of" the personal injury; they are awarded on account of the tortfeasor's malice. Because punitive damages are awarded to punish and deter the tortfeasor, rather than as compensation for the plaintiff's injury, they are not excluded from income by Section 104(a)(2).

As five of the courts of appeals have concluded, that understanding of the statute comports with its text, its structure, its history and its evident purpose. It is also compelled by the established principle that exclusions from income must be narrowly construed.

2. a. The notice of appeal that the government filed in the case of petitioner Kelly O'Gilvie (No. 95-977) was not untimely. The refund suit commenced by Kelly O'Gilvie presented two distinct issues: (i) whether a punitive damage award is excluded from gross income under Section 104(a)(2) of the Internal Revenue Code; and (ii) whether post-trial interest paid on such damages is excluded from gross income under that statute. On August 26, 1992, the court entered judgment in favor of petitioner with respect to the first issue. But that judgment was withdrawn on October 27, 1992, because the second issue had not yet been decided. On November 30, 1993, the court adjudicated and entered judgment in favor of the government on the second issue. On December 7,

1993, the court then entered an "amended" judgment that, for the first time, addressed both issues. The December 7, 1993, judgment was the only judgment that disposed of the entire case and was thus the only judgment from which an appeal could be taken. The notice of appeal was filed by the government within 60 days from that date and was therefore timely.

b. The suit brought by the government for recovery of the refund erroneously made to Kevin and Stephanie O'Gilvie (No. 95-966) is not barred by the applicable statute of limitations. The affirmative defense of the statute of limitations was not raised in their pleadings, is precluded by their stipulation, was not presented to the district court and therefore may not be raised at this time.

In any event, under Section 6532(b) of the Internal Revenue Code, an erroneous refund may be recovered in a suit brought within two years "after the making of such refund." 26 U.S.C. 6532(b). It is well established that a "refund" is not made until the funds are delivered to the taxpayer. As this Court stated in *United States* v. *Wurts*, 303 U.S. 414, 417-418 (1938), a refund is not made "even after a check is signed and mailed," for the check may be cancelled and not paid. A "refund" is made when the money is restored to the taxpayer—when the "funds" are delivered to him. Because the government filed its suit for recovery of the erroneous refund in this case within two years of the date on which the refund checks were received by petitioners, the suit was timely under Section 6532(b).

ARGUMENT

I

A PUNITIVE DAMAGE AWARD IS NOT EXCLUDED FROM GROSS INCOME UNDER SECTION 104(a)(2) OF THE INTERNAL REVENUE CODE AS "DAMAGES RECEIVED * * * ON ACCOUNT OF PERSONAL INJURIES OR SICKNESS"

The first step in calculating taxable income under the Internal Revenue Code is to determine the taxpayer's "gross income." Section 61(a) provides that, subject to specific exclusions set forth elsewhere in the Code, "gross income means all income from whatever source derived." This sweeping statutory definition broadly reflects the Legislature's intent to exert the full measure of its taxing power. *Commissioner* v. *Schleier*, 115 S. Ct. at 2163; *United States* v. *Burke*, 504 U.S. 229, 233 (1992). Any funds or other "accessions to wealth" (*Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955)) received by a taxpayer represent "gross income" unless the taxpayer establishes that the income falls within one of the specific exclusions created by other Sections of the Code.

It is not disputed that the punitive damages received by petitioners represent an "accession to wealth" that constitutes "gross income" within the broad scope of Section 61(a). The question presented in this case is whether that payment is excluded from "gross income" by Section 104(a)(2) of the Code, which provides that "gross income does not include * * * the amount of any damages received * * * on account of personal injuries or sickness." 26 U.S.C. 104(a)(2). As an exclusion from gross income, Section

104(a)(2) must be narrowly construed. *Commissioner* v. *Schleier*, 115 S. Ct. at 2163; *United States* v. *Centennial Savings Bank*, 499 U.S. 573, 583-584 (1991). See also *United States* v. *Burke*, 504 U.S. at 244 (Scalia, J., concurring); *id.* at 248 (Souter, J., concurring).

A. *Section 104(a)(2) authorizes an exclusion from income only for damages received on account of personal injuries or sickness*

In *Commissioner* v. *Schleier*, 115 S. Ct. at 2167, the Court explained that a taxpayer must establish "two independent requirements" to qualify for the exclusion provided in Section 104(a)(2). First, the taxpayer must establish that the underlying cause of action giving rise to the recovery is based upon tort or tort type rights. 115 S. Ct. at 2167. See also *United States* v. *Burke*, 504 U.S. at 237; Treas. Reg. § 1.104-1(c) (the term "damages received" means "an amount received * * * through prosecution of a legal suit or action based upon tort or tort type rights"). The "primary characteristic" of a tort type action is the availability of compensation for "the traditional harms associated with personal injury, such as pain and suffering, emotional stress, harm to reputation, or other consequential damages." *Commissioner* v. *Schleier*, 115 S.Ct. at 2167, quoting *United States* v. *Burke*, 504 U.S. at 239. That requirement is unquestionably met in a wrongful death action, such as is involved in this case.

The Court emphasized in *Commissioner* v. *Schleier*, however, that the fact that the damages were awarded in a "tort or tort type" suit does not "constitute[] the beginning and end of the analysis." 115 S. Ct. at 2167. That the damages were recovered in a

tort-like cause of action is only "a necessary condition for excludability under § 104(a)(2), it is not a sufficient condition." *Ibid.* The second, independent requirement of the statute is that the taxpayer must establish that the damages received were "on account of" a personal injury. *Id.* at 2166, 2167. To satisfy this second requirement, the taxpayer must show that the damages recovered were "attributable to" the personal injury and that the "personal injury affected the amount of [the recovery.]" *Id.* at 2164.

The decision in *Schleier* provides an example of the operation of this second requirement of the statute. In *Schleier*, the Court acknowledged that a violation of the Age Discrimination in Employment Act may cause "psychological or 'personal injury'" to the employee. 115 S. Ct. at 2164. But the statutory award of back pay redresses only the loss of wages that results from a violation of the Act; the award "is completely independent of the existence or extent of any personal injury." 115 S. Ct. at 2164. The Court concluded that the recovery of back wages under the Act "was not 'on account of' any personal injury * * * because no personal injury affected the amount of back wages recovered." *Ibid.* A recovery in a personal injury suit that is not "attributable to that injury" is not excluded from income under Section 104(a)(2). 115 S. Ct. at 2164.

B. *Punitive damages are not received "on account of" personal injuries*

1. In *Schleier*, the Court rejected the contention that the statutory award of liquidated damages for willful violations of the Age Discrimination in Employment Act is excluded from tax under Section 104(a)(2). The Court explained that such damages are

"punitive in nature," rather than compensatory, and therefore do not meet the statutory requirement that the damages be received "on account of" personal injuries or sickness. 115 S. Ct. at 2165.

Damages that are "punitive in nature" are designed to punish the wrongdoer, not to "compensate plaintiffs for personal injuries." *Commissioner* v. *Schleier*, 115 S. Ct. at 2165. As this Court stated in *International Brotherhood of Electric Workers* v. *Foust*, 442 U.S. 42, 48 (1979), quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974):

> Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."

See also *BMW of North America, Inc.* v. *Gore*, No. 94-896 (May 20, 1996), slip op. 7 (punitive damages are awarded to "punish[] unlawful conduct and deter[] its repetition"). Damages awarded as punishment of a wrongdoer, rather than as compensation for injury, are awarded "on account of" the malice or willfullness of the tortfeasor, not "on account of" personal injury. *Commissioner* v. *Miller*, 914 F.2d at 589-592. Accord, *Hawkins* v. *United States*, 30 F.3d at 1080-1084; *Reese* v. *United States*, 24 F.3d at 230-235. Moreover, the amount of the punitive award is measured by the State's interest in punishing and deterring the wrongdoer's conduct; it is not measured by the personal injury of the plaintiff. *BMW of North America, Inc.* v. *Gore*, slip op. 7 (punitive damages are awarded in amounts "reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence"). As five of the courts of appeals have held (Pet. App. 13a), punitive awards therefore do not

represent damages "on account of personal injury" within the meaning of Section 104(a)(2).[3]

"[T]he common law recognizes that damages intended to compensate the plaintiff are different in

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[3] The only circuit that reached a different conclusion relied on an understanding of Section 104(a)(2) that this Court expressly rejected in *Commissioner* v. *Schleier*, *supra*. In *Horton* v. *United States*, 33 F.3d at 631, the Sixth Circuit stated that, if "the underlying claim is one for a personal, physical injury," the "entire recovery is excludable" under Section 104(a)(2). In *Schleier*, however, the Court stated that the question whether "the underlying action is 'based upon tort or tort type rights'" is *not* "the beginning and end of the analysis." 115 S. Ct. at 2167 (quoting *Burke*, 504 U.S. at 234). There are "two independent requirements that a taxpayer must meet before a recovery may be excluded under § 104(a)(2)." 115 S. Ct. at 2167. The taxpayer must demonstrate not only that the underlying cause of action is based upon tort or tort type rights; the taxpayer must also demonstrate "that the damages were received 'on account of personal injuries or sickness.'" *Ibid.* As all other courts of appeals have recognized (Pet. App. 13a-16a), it is the latter requirement, not the former, that controls the determination whether punitive damages are excluded from income under Section 104(a)(2). The decision in *Horton* does not address the latter requirement and thus plainly fails to apply the analysis required by this Court in *Schleier*.

The Ninth Circuit once held that punitive damages were excluded from income under the statute, but did so in reliance on a 1975 Revenue Ruling that had abandoned the Treasury's prior, longstanding position that punitive damages were not excluded from income under Section 104(a)(2). See *Commissioner* v. *Miller*, 914 F.2d at 591, citing *Roemer* v. *Commissioner*, 716 F.2d 693, 700 (9th Cir. 1983). After the Treasury returned to its original view, and ruled again in 1984 that punitive damages are not excluded from income (see pages 25-26, *infra*), the Ninth Circuit rejected its decision in *Roemer* and interpreted the statute not to exclude punitive damages from income. *Hawkins* v. *United States*, 30 F.3d at 1082.

kind from 'punitive damages'." *Molzof* v. *United States*, 502 U.S. 301, 307 (1992). "The term 'punitive damages' * * * embodies an element of the defendant's conduct that must be proved before such damages are awarded" (*id.* at 308). Petitioners have acknowledged that the punitive awards at issue in this case were designed to punish the tortfeasor and had no compensatory purpose (Pet. App. 14a n.10).[4] Because the award of punitive damages is attributable to the tortfeasor's malice, and is not compensation for the plaintiff's injury, the award is not excluded from income as "damages received * * * on account of personal injury or sickness" under Section 104(a)(2).

2. This understanding of the statute comports with its text, structure, history and evident purpose. It is also compelled by the established principle that exclusions from income must be narrowly construed.

a. As the court of appeals explained in *Reese* v. *United States*, 24 F.3d at 230, "[t]he language 'on account of' is not free of ambiguity; rather it is susceptible of at least two conflicting interpretations."

> Under a but-for causation approach, the fact that a plaintiff has to sustain a personal injury as a prerequisite to an award of punitive damages leads to the conclusion that the punitive damages were "on account of" the plaintiff's injury, even though a punitive damage award requires the additional showing of, and is responsive only to, egregious conduct by the defendant. However,

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[4] Petitioner Kelly O'Gilvie also acknowledges in his brief (95-977 Pet. Br. 16, 39) that the Court applied a "compensatory purpose" test in analyzing the scope of Section 104(a)(2) in *Commissioner* v. *Schleier*, *supra*.

> under a sufficient causation approach, the fact that personal injury is a prerequisite to punitive damages does *not* lead to the conclusion that the punitive damages were "on account of" the plaintiff's injuries because, even if the other elements of the tort are present, personal injury alone does not sustain a punitive damage award. The fact that a plaintiff seeking punitive damages has to show egregious conduct by the defendant indicates that the plaintiff's injury was not a sufficient cause of the punitive damages. Thus, the mere fact that "on account of" suggests "causation" does not answer the question of whether "on account of" suggests but-for causation or sufficient causation.

Commissioner v. *Miller*, 914 F.2d at 589-590 (footnote omitted). Accord, *Reese* v. *United States*, 24 F.3d at 230-231.

Based upon the "well-recognized, even venerable, principle that exclusions to income are to be construed narrowly," these courts correctly resolved the conceptual ambiguity of the text in favor of a narrow construction of the statutory exclusion from income. *Commissioner* v. *Miller*, 914 F.2d at 590, citing *Commissioner* v. *Jacobson*, 336 U.S. 28, 49 (1949). See also *Hawkins* v. *United States*, 30 F.3d at 1084, citing *United States* v. *Centennial Savings Bank*, 499 U.S. at 583-584. They concluded that punitive damage awards are not excluded from income under Section 104(a)(2) because such awards are obtained "on account of" the defendant's malice or willfulness rather than "on account of" the personal injuries of the taxpayer.

b. The legislative history and evident purpose of the statute compel the same conclusion. Section 104(a)(2) was first enacted as Section 213(b)(6) of the Revenue Act of 1918, ch. 18, 40 Stat. 1066 (1919). As the court of appeals explained in *Reese* v. *United States*, 24 F.3d at 233 (parallel citations omitted), just prior to the enactment of the Revenue Act of 1918

> the Secretary of the Treasury requested an opinion from the Attorney General concerning the tax treatment of accident insurance proceeds received on account of personal injuries. *See* 31 Op. Atty. Gen. 304 (1918). In response, the Attorney General concluded that "the proceeds of an accident insurance policy [were] not 'gains or profits and income'" but were instead a return of capital and hence were not taxable in accordance with statute and precedent. *Id.* at 308; *accord Doyle* v. *Mitchell Bros Co.*, 247 U.S. 179, 185 (1918).

After the Attorney General's report, the IRS issued a decision holding that "the proceeds of an accident insurance policy received by an individual on account of personal injuries . . . [were] not taxable . . . ." T.D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918). Moreover, the IRS held "upon similar principles that an amount received by an individual as the result of a suit or compromise for personal injuries" would not be taxable. *Id.*

Subsequent to these events, Section 213(b)(6) was enacted. In a 1918 report of the House Committee on Ways and Means, Congress explained the rationale behind Section 213(b)(6) as follows:

> Under the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income. The proposed bill provides that such amounts shall not be included in gross income.

H.R. Rep. No. 767 at 9-10 (1918). With the passage of Section 213(b)(6), Congress likely intended to codify the IRS's stated approach, which was in turn based on the Attorney General's opinion. After the enactment of Section 213(b)(6), the IRS noted that "so far as personal injuries are concerned, [Section 213(b)(6)] is merely declarative of the [Attorney General's and IRS's] conclusions and intended to go no further." 2 C.B. 71, 72 (1920) (citing 31 Op. Atty. Gen. 304 and T.D. 2747). The IRS continued: "These conclusions rest, as stated, upon the theory of conversion of capital assets. It would follow that personal injury not resulting in the destruction or diminution in the value of a capital asset would not be within the exemption." *Id.* at 72.

In view of the focus on the "conversion of capital assets" theory in the passage of Section 104(a)(2)'s predecessor, it would be inconsistent with the legislative history to treat punitive damages as excludable from income, since punitive damages in no way resemble a return of capital.

This Court reviewed much of this same legislative and administrative history in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955). In that case, the Court concluded that punitive damages for fraud and statutory treble damages under the antitrust laws are income subject to tax. In so holding, the Court stated (*id.* at 432 n.8; emphasis added):

> The long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital cannot support exemption of punitive damages[.] * * * *Damages for personal injury are by definition compensatory only.*

As the Court thus indicated in *Glenshaw Glass*, the limitation of Section 104(a)(2) to damages that compensate for the injury—and its inapplicability to awards that punish and deter others—comports with the history and purpose of the statute, as well as with its text and structure. See *Wesson* v. *United States*, 48 F.3d at 898-899; *Hawkins* v. *United States*, 30 F.3d at 1080-1084; *Commissioner* v. *Miller*, 914 F.2d at 590. See also 1 Boris Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts* ¶ 13.1.4, at 13-9 (2d ed. 1989) ("The rationale for [Section 104(a)(2)] * * * is presumably that the recovery does not generate a gain or profit but only makes the taxpayer whole by compensating for a loss.").[5]

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[5] In *Starrels* v. *Commissioner*, 304 F.2d 574, 576 (9th Cir. 1962), the court explained that the history and administration of this statute reveal that "[d]amages paid for personal injuries are excluded from gross income because they make the taxpayer whole from a previous loss of personal rights—because, in effect, they restore a loss of capital." Petitioners

c. The title and structure of the statute reflect the same conclusion.[6] Section 104(a) provides exclusions from income for "[c]ompensation for injuries or sickness," not for sanctions awarded to punish and deter malicious or willful misconduct. 26 U.S.C.

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object (95-966 Pet. Br. at 21-22) to the rhetorical phrase—"in effect, restor[ing] a loss of capital"—that Judge Browning used in describing the objective of the statute. But that phrase followed Judge Browning's more concrete description of the statute's purpose as allowing an exemption for damage recoveries that compensate or "make the taxpayer whole from a previous loss of personal rights." 304 F.2d at 576. An award of punitive damages is not compensation to the plaintiff; it is punishment of the defendant. It therefore does not come within the text or the object of Section 104(a)(2).

[6] Petitioners err in asserting (95-966 Pet. Br. 25) that, under Section 7806(b) of the Internal Revenue Code, the title of a Section may not be considered as an aid in understanding its intended scope. Section 7806(b) provides (26 U.S.C. 7806(b)):

> No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, nor shall any table of contents, table of cross references, or similar outline, analysis or descriptive matter relating to the contents of this title be given any legal effect.

Nothing in the plain text of Section 7806(b) bars consideration of the title of a statute in determining its meaning. In *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991), this Court noted that "the title of a statute or section can aid in resolving an ambiguity in the legislation's text." *Id.* at 189, citing, *e.g.*, *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989). That same conclusion has been reached by this Court in cases arising under the internal revenue laws. *Maguire* v. *Commissioner*, 313 U.S. 1, 9 (1941) ("the title of an act * * * may be of aid in resolving an ambiguity"). Section 7806(b) of the Code does not require any different conclusion.

104(a).[7] Each of the several subsections of the statute is designed to exempt compensation for a personal injury to the the taxpayer, not recoveries awarded to punish others. Section 104(a)(1) excludes from gross income "amounts received under workmen's compensation acts as compensation for personal injuries or sickness"; Section 104(a)(3) excludes certain "amounts received through accident or health insurance for personal injuries or sickness"; Section 104(a)(4) excludes "amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service"; and Section 104(a)(5) excludes "amounts received by an individual as disability income attributable to injuries incurred as a direct result of a * * * terrorist attack * * * while such individual was an employee of the United States engaged in the performance of his official duties outside the United States." 26 U.S.C. 104(a)(1)-(5). As the Federal Circuit correctly observ-

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[7] Petitioners correctly note (95-966 Pet. Br. 16-18) that the title of Section 104—"Compensation for injuries or sickness"—was not contained in the original enactment of the statute as Section 213(b)(6) of the Revenue Act of 1918. But Congress has given that same title to the statute from the first codification in 1939 to the present date. The title was unchanged when the Code was recodified in 1954 and again in 1986. This case relates to taxes owed for 1988, a time subsequent to three codifications in which Congress employed the same title in reenacting Section 104(a)(2). The title that Congress has employed for Section 104 throughout its reenactment of that Section and its recodification over a period of half a century properly serves as an aid in resolving any ambiguity in the text of the statute, certainly as applied to events that occurred subsequent to those reenactments and recodifications.

ed in *Reese* v. *United States*, 24 F.3d at 231, the focus of the statute in general, and of each of its subsections in particular, is on amounts that compensate for injury or sickness, not on payments exacted to punish misconduct. Accord *Hawkins* v. *United States*, 30 F.3d at 1083. Cf. *United States* v. *Burke*, 504 U.S. at 244 (Scalia, J., concurring).

3. a. Petitioners contend (95-966 Pet. Br. 13; see 95-977 Pet. Br. 27-29) that Section 104(a)(2) "clearly and on its face" excludes punitive damages from gross income. Petitioners emphasize that the statute excludes from gross income "*any* damages received * * * on account of personal injuries or sickness" (26 U.S.C. 104(a)(2) (emphasis added)), and they contend that, under this text, the only test for excludability under Section 104(a)(2) is whether the damages at issue were awarded in a personal injury suit.

The flaw in petitioners' position is manifest. Their argument seeks to isolate the statutory term "any damages" from the subsequent term "on account of personal injuries." This Court has emphasized, however, that it does not "construe statutory phrases in isolation; we read statutes as a whole." *United States* v. *Morton*, 467 U.S. 822, 828 (1984). See also *Stafford* v. *Briggs*, 444 U.S. 527, 535 (1980); *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975). Read as a whole, any damages may be excluded under Section 104(a)(2) only if those damages are awarded "on account of personal injuries or sickness." *Commissioner* v. *Schleier*, 115 S. Ct. at 2167.

This Court has expressly rejected the contention that Section 104(a)(2) excludes any award of damages from gross income simply upon proof that the damages were received in a case involving personal injury. See note 3, *supra*. In *Commissioner* v. *Sch-*

Commissioner, the Court stated that whether "the underlying action is 'based upon tort or tort type rights'" is *not* "the beginning and end of the analysis." 115 S. Ct. at 2167. There are "two independent requirements that a taxpayer must meet before a recovery may be excluded under § 104(a)(2)." 115 S. Ct. at 2167. The taxpayer must demonstrate not only that the underlying cause of action is based upon tort or tort type rights; the taxpayer must also demonstrate "that the damages were received 'on account of personal injuries or sickness.'" *Ibid.* Damages that are "punitive in nature" do not satisfy the latter requirement (*id.* at 2165), for they are awarded on account of the "defendant's egregious conduct and the jury's desire to punish and deter such conduct" and "not because of a personal injury" (*Reese* v. *United States*, 24 F.3d at 231).

b. Petitioners contend (95-966 Pet. Br. 14) that the dictionary definition of "on account of" supports their proposed interpretation of the statute. Petitioners note that the term "on account of" is defined to mean "for the sake of," "by reason of," or "because of." *Webster's Third New International Dictionary (Unabridged)* 13 (1976). But punitive damages are not received "for the sake of," "by reason of," or "because of" the personal injury suffered. Instead, punitive damages are received "for the sake of," "by reason of," and "because of" the egregious conduct of the defendant and the desire to punish and deter that conduct. Punitive damages are awarded "to vindicate the State's legitimate interest in punishment and deterrence" and may be awarded even in suits that do not involve personal injuries. See *BMW of North America, Inc.* v. *Gore*, No. 94-896 (May 20, 1996), slip op. 7. See also pages 13-15, *supra*.

In addition to the decision of this Court in *Schleier*, five of the courts of appeals have rejected the contention that damages awarded in a personal injury case are excluded from income under Section 104(a)(2) without a showing that the award was "on account of" the injury. See *Wesson* v. *United States*, 48 F.3d at 898; *Hawkins* v. *United States*, 30 F.3d at 1080; *Reese* v. *United States*, 24 F.3d at 230; *Commissioner* v. *Miller*, 914 F.2d at 589-590. See also note 3, *supra*. Petitioners correctly note (95-966 Pet. Br. 30-31) that the Tax Court formerly disagreed with these decisions and once held that an award of punitive damages is excluded from income whenever the underlying claim involves a personal injury. Relying upon this Court's decision in *Schleier*, however, the Tax Court repudiated its former position and now holds that punitive damages are *not* exempt from tax under Section 104(a)(2). The court explained in *Bagley* v. *Commissioner*, 105 T.C. 396, 417 (1995), appeal pending, No. 96-1768 (8th Cir.), that "[t]he Supreme Court has made it clear in the *Schleier* case that damages which are not compensatory but punitive in nature are not excludable from gross income under section 104(a)(2)."

c. Petitioners correctly note (95-966 Pet. Br. 27-31; 95-977 Pet. Br. 31-32) that the Internal Revenue Service has, over time, expressed differing views concerning the excludability of punitive damages under Section 104(a)(2). See Rev. Rul. 85-98, 1985-2 C.B. 51; Rev. Rul. 84-108, 1984-2 C.B. 32; Rev. Rul. 75-45, 1975-1 C.B. 47. During the period prior to 1975 and consistently since 1984, however, the Service has concluded that punitive damages do not represent an award "on account of personal injuries" within the scope of the statute.

It is well settled that "the Commissioner may change an earlier interpretation of the law" (*Dickman* v. *Commissioner*, 465 U.S. 330, 343 (1984)) and thereby "correct mistakes of law in the application of the tax laws to particular transactions" (*Dixon* v. *United States*, 381 U.S. 68, 72 (1965)). Courts are to look to the current, formal view of the Commissioner rather than to a discarded, prior ruling. See *Commissioner* v. *Miller*, 914 F.2d at 591; Mary Jane Morrison, *Getting a Rule Right and Writing a Wrong Rule: The IRS Demands a Return on All Punitive Damages*, 17 Conn. L. Rev. 39 (1984). "[A] revised interpretation deserves deference" if it reflects a "reasoned analysis." *Rust* v. *Sullivan*, 500 U.S. 173, 186-187 (1991), citing, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 862 (1984). See also *Smiley* v. *Citibank (South Dakota), N.A.*, No. 95-860 (June 3, 1996), slip op. 6. As the numerous, consistent appellate decisions reflect, the Commissioner's 1984 determination that punitive damages are not excluded from income under Section 104(a)(2) reflects a "reasoned analysis" of the statute and the Treasury's implementing regulation and is therefore entitled to deference.[8]

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[8] Deference is afforded to the Commissioner's interpretation of the internal revenue laws because (*National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979)):

> "Congress has delegated to the * * * Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code. 26 U.S.C. §7805(a)." *United States* v. *Correll*, 389 U.S. 299, 307 (1967). That delegation helps ensure that in "this area of limitless factual variations," *ibid.*, like cases will be treated alike. It also helps guarantee that the rules will be written by "masters of the subject," *United States*

d. Petitioners argue (95-966 Pet. Br. 15-19; 95-977 Pet. Br. 26-29) that the text of Section 213(b)(6) of the Revenue Act of 1918—the original predecessor of Section 104(a)(2)—reflects that, while Congress intended to allow exclusion of only compensatory recoveries for insurance and workmen's compensation claims, it intended to allow a broader exclusion for recoveries for the same types of personal injuries that result from litigation. Section 213(b)(6) provided that gross income did not include (Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1066 (1919)):

> Amounts received through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries.

Petitioners assert that, while the exclusion for recoveries from accident and health insurance and workmen's compensation were limited to "compensation for personal injuries or sickness," the exclusion for recoveries from "suit or agreement" extended to "any damages received."

Here, as before, the flaw in petitioners' contention is manifest. Petitioners seek to tear asunder words that the statute has joined together. Under the plain text of Section 213(b)(6) of the Revenue Act of 1918, the exclusion for recoveries from a "suit or agreement" involving "personal injuries or sickness" extended only to "any damages received * * * on account of such injuries." The language of that statute is thus indistinguishable from the language of

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v. *Moore*, 95 U.S. 760, 763 (1868), who will be responsible for putting the rules into effect.

Section 104(a)(2), which petitioners have similarly attempted to splinter. See pages 23-24, *supra*.

Petitioners' assertion that a broader exclusion was provided for recoveries through litigation than for recoveries through insurance or workmen's compensation is thus plainly inconsistent with the text of the statute. It also draws no support from common sense. There is no reason to suspect that Congress desired to achieve the implausible result of providing a broader tax immunity for litigation, than for insurance, recoveries for the same "personal injuries or sickness." To the contrary, the history of the statute reflects that it sought to achieve a parity of treatment in the two situations and was drafted to ensure that both would be encompassed within the same exclusionary principle. See *Reese* v. *United States*, 24 F.3d at 232-233; T.D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918) (noting that the exclusion of insurance and litigation recoveries is based "upon similar principles").

e. Finally, petitioners contend (95-966 Pet. Br. 31-34; Pet. 95-977 Pet. Br. 39-43) that an amendment made to Section 104(a)(2) in 1989 provides evidence that punitive damages are excluded from tax under that statute. In 1989, Section 104(a) was amended to provide that Section 104(a)(2)'s exclusion "shall not apply to any punitive damages [received] in connection with a case not involving physical injury or physical sickness." 26 U.S.C. 104(a). See Revenue Reconciliation Act of 1989, Pub. L. No. 101-239, Tit. VII, § 7641(a), 103 Stat. 2379. In *United States* v. *Burke*, the Court suggested that this amendment "allow[s]" the exclusion of punitive damages in physical injury cases after 1989. 504 U.S. at 236 n.6. That question, however, was not presented in *Burke* and

had not been addressed by the parties in that case. The Court's statements on that issue in *Burke* were therefore dicta. See, *e.g.*, *Reese* v. *United States*, 24 F.3d at 235. The proper interpretation of the 1989 amendment is also not at issue in the present case, which involves events that preceded the effective date of that amendment.

This Court has long rejected the argument that an amendment to the tax laws provides evidence that the law was formerly otherwise. *Higgins* v. *Smith*, 308 U.S. 473, 479-480 (1940). That principle applies with particular force in this case, for neither the text of the 1989 amendment nor its history contains any suggestion that Congress (either in 1989 or in 1919) believed that punitive damages were properly excluded from income under the original statute.[9] Instead, the legislative history of the amendment unequivocally reveals that the purpose of the amendment was quite limited: Congress desired to reverse then-recent decisions that had allowed the exclusion of punitive damages in nonphysical injury cases and, at the same time, to take no position on whether the statute permitted exclusion of punitive damages in physical injury cases.

The 1989 amendment originated in a House bill that would have confined the Section 104(a)(2) exclusion to damages received in cases involving physical injury or physical sickness. H.R. 3299, 101st Cong., 1st

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[9] As this Court has frequently emphasized, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). The interpretive value of an amendment to a statute is particularly dubious when, as here, the amendment was enacted long after the original provision. *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958).

Sess. § 11641 (1989). The House report states that this bill was a reaction to (i) then-recent decisions (prior to *Burke*), such as *Threlkeld* v. *Commissioner*, 848 F.2d 81 (6th Cir. 1988), that had held damages recovered in nonphysical injury cases involving employment discrimination and injury to reputation to be excluded from gross income and (ii) the Tax Court's decision in *Miller* v. *Commissioner*, 93 T.C. 330 (1989), rev'd, 914 F.2d 586 (4th Cir. 1990), which held, prior to its reversal, that punitive damages in a defamation suit were excludable from gross income. H.R. Rep. No. 247, 101st Cong., 1st Sess. 1354-1355 (1989). The House bill was modified in conference to provide only that the Section 104(a)(2) exclusion "shall *not* apply to any punitive damages [received] in connection with a case *not* involving physical injury or physical sickness." Revenue Reconciliation Act of 1989, Pub. L. No. 101-239, Tit. VII, § 7641(a), 103 Stat. 2379 (emphasis added). As Professor Kahn has recently noted, the Conference Committee redacted language from another version of the bill that had affirmatively provided for the exclusion of punitive damages received in physical injury cases and substituted the double negative phraseology contained in the 1989 amendment. Douglas A. Kahn, *Compensatory and Punitive Damages for a Personal Injury: To Tax or Not to Tax?*, 2 Fla. Tax Rev. 327, 369-370 (1995). The amendment enacted by Congress thus precludes application of the Section 104(a)(2) exclusion to punitive damages received in nonphysical injury cases but is silent as to the taxation of punitive damages received in physical injury cases. As Professor Kahn observes (2 Fla. Tax Rev. at 370):

> Congress did not inadvertently omit to make an explicit statment that punitive damages connected with a physical injury are excluded. To the contrary, the draft containing that statement was altered to avoid taking a position on that issue. It is clear then that the 1989 amendment has no bearing on the excludability of punitive damages in cases involving physical injury.

As the Ninth Circuit stated in *Hawkins* v. *United States*, 30 F.3d at 1082:

> Congress may amend a statute simply to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases. Thus, an amendment to a statute does not necessarily indicate that the unamended statute meant the opposite. * * * At the time of the proposed amendment, several cases had recently held that § 104(a)(2) excludes damages recovered in cases involving employment discrimination and injury to reputation * * * and some had even held that punitive damages awarded in such cases are excludable. * * * That Congress elected to overrule such cases does not prove that, prior to Congress's action, the statute meant the opposite.

Accord, *Wesson* v. *United States*, 48 F.3d at 901. Nothing in the history of the amending statute indicates an intent to exempt punitive damages in physical injury cases. Any interpretation of the amendment to allow the exclusion of punitive damages in physical injury cases after 1989 would thus be contrary to the fundamental principle of statutory construction that "[e]xemptions from taxation do not rest upon implication." *United States Trust Co.* v.

Helvering, 307 U.S. 57, 60 (1939). Accord, *Hawkins* v. *United States*, 30 F.3d at 1082 n.7.

4. The text, history, purpose, title and structure of Section 104(a)(2) therefore all support the conclusion that punitive damages are not excludable from gross income under that statute. Because Section 104(a)(2) provides an exemption from tax, any ambiguity that might exist in the statute must be resolved in favor of the same conclusion. See *Commissioner* v. *Schleier*, 115 S. Ct. at 2163.

II

A. *The notice of appeal filed by the government in No. 95-977 was timely*

When the United States is a party to a civil case, "the notice of appeal may be filed by any party within 60 days" after the date of entry of the judgment or order. Fed. R. App. P. 4(a)(1); see 28 U.S.C. 2107(b). The United States filed its notice of appeal in this case on February 1, 1994—less than 60 days after the district court entered its final, "amended" judgment of December 7, 1993. Petitioner Kelly O'Gilvie, however, contends (95-977 Pet. Br. 43-46) that the time for filing the appeal ran from the entry of the November 30 judgment that disposed only of the interest issue. He asserts that the government's notice of appeal is therefore untimely. That contention is incorrect.

The courts of appeals have jurisdiction over "appeals from all final decisions of the district courts" (28 U.S.C. 1291). An order is not "final" for purposes of appellate review unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978), quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945).

When, as in the present case, more than one claim for relief is presented in the district court, an order disposing of only one of the claims is not a "final" order from which an appeal may be taken. Rule 54(b) of the Federal Rules of Civil Procedure provides that (emphasis added):

> [w]hen more than one claim for relief is presented in an action, * * * the court may direct the entry of a final judgment as to one or more but fewer than all of the claims * * * only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. *In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as to any of the claims or parties*, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In this case, petitioner Kelly O'Gilvie asserted two substantive claims for relief: he sought a refund of the taxes he paid (i) on the punitive damage award that he received and (ii) on a portion of the post-judgment interest that he received on that award (Pet. App. 5a-7a). The district court initially adjudicated the punitive damage issue in the government's favor on May 26, 1992. On August 26, 1992, however, the court vacated that order and entered a new order ruling in petitioner's favor on that issue. Then, on October 27, 1992, recognizing that petitioner's refund claim for the taxes paid on post-

judgment interest had not been adjudicated, the court withdrew its August 26 order "subject to reinstatement at the conclusion of the case" (*id.* at 6a n.5). On November 30, 1993, the court addressed the interest issue for the first time, entering judgment in favor of the government (*id.* at 5a-6a). One week later, on December 7, 1993, the court entered an "amended" and final order that (i) granted judgment in favor of petitioner on his claim that the punitive damage award was not subject to tax and (ii) granted judgment in favor of the United States on petitioner's claim that the interest he received was not subject to tax (*id.* at 6a). The government filed its notice of appeal within 60 days of the last order entered by the district court (*id.* at 7a).[10]

Only the judgment of December 7 adjudicated *all* of the claims of the parties in this suit. None of the prior orders—including the order of November 30, 1993—disposed of all of the issues in the case. None of the prior orders was therefore a final, appealable order. See, *e.g.*, *UGI Corp.* v. *Clark*, 747 F.2d 893 (3d Cir. 1984); *International Controls Corp.* v. *Vesco*, 535 F.2d 742, 748 (2d Cir. 1976); 6 James Wm. Moore, *Moore's Federal Practice* ¶ 54.34[1], at 54-169 to 54-170 (1996). As the court of appeals correctly held (Pet. App. 7a-8a), because the notice of appeal was filed by the United States within 60 days of the final judgment entered on December 7, 1993, the appeal was timely.[11]

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[10] The United States also appealed the separate order in the companion case that involved the refund made to Kevin and Stephanie O'Gilvie (Pet. App. 7a n.6). The timeliness of the appeal filed in that case is not disputed.

[11] This case does not involve a correction of a clerical error under Fed. R. Civ. P. 60(a). Until the December 7 judgment was entered, there had been no final judgment from which an

B. ***The government's suit for recovery of the erroneous refund in No. 95-966 was timely***

Under Section 7405(a) of the Internal Revenue Code, any refund that "is erroneously [made] * * * may be recovered by civil action brought in the name of the United States." 26 U.S.C. 7405(a). Section 6532(b) of the Code provides a statute of limitations for such claims. It specifies that, in the absence of fraud by the taxpayer, "[r]ecovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund" (26 U.S.C. 6532(b)).

The government commenced its suit for recovery of the erroneous refunds against petitioners in No. 95-966 on July 9, 1992. The complaint alleged that the erroneous refund was made on July 9, 1990 (J.A. 62a). Petitioners admitted the truth of that allegation in their answer (J.A. 64a). The answer claimed only that the refunds were not erroneous; no other defense was pled. In particular, neither the answer nor any further pleading alleged that the statute of limitations on the government's claim had expired (J.A. 64a-65a).[12]

When the United States appealed the judgment entered in petitioners' favor on the merits of the tax

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appeal could properly be taken. That the court denominated its final judgment as an "amended" judgment does not alter the fact that none of its prior orders had disposed of the entire case. See Fed. R. Civ. P. 54(b).

[12] In a stipulation filed by the parties more than one year after the complaint was filed, the parties agreed that "[t]here are no factual issues in dispute" and that "[t]he sole legal issue in dispute between the parties is whether the punitive damages received by [petitioners] are excludable from income pursuant to 26 U.S.C. Section 104(a)(2)" (Pet. App. 39a).

issue in the district court (J.A. 66a), petitioners sought to raise for the first time a new contention in support of the judgment below. They asserted that, although they received the refund checks on July 9, 1992, the "checks had to have been mailed before July 9, 1990" (Pet. App. 8a). They argued that a "refund" is made for purposes of the two-year statute of limitations in Section 6532(b) when the check is mailed, not when it is received, and that the government's suit for recovery of the refund was therefore necessarily untimely (*ibid.*). Petitioners are in error for two separate reasons:

(i) The statute of limitations is an affirmative defense. It must be pled "affirmatively" in the answer. Fed. R. Civ. P. 8(c). The answer filed by petitioners, however, failed to raise the statute of limitations as a defense. The answer also admitted facts that establish that the government's suit (commenced on July 9, 1992) was timely, for it admitted that "[o]n July 9, 1990, the Internal Revenue Service refunded" the amounts at issue in this case (J.A. 62a, 64a). The stipulation thereafter filed by petitioners made the same factual concession and further affirmatively stated that the only "legal issue" presented in this case is the applicability of Section 104(a)(2) to punitive damage awards (Pet. App. 39a). Because the affirmative defense of the statute of limitations was not raised in the pleadings or otherwise presented to the district court, and because that defense is precluded and, indeed, contradicted by the stipulation of the parties, petitioners are barred from raising that issue in the court of appeals and in this Court. See, *e.g.*, *Marcus* v. *Sullivan*, 926 F.2d 604 (7th Cir. 1991); *Roberts* v. *College of the Desert*, 870 F.2d 1411 (9th Cir. 1989); 2A James Wm. Moore, *Moore's*

Federal Practice ¶ 8.27[3], at 8-172 (2d ed. 1995) ("Nor may an affirmative defense be raised for the first time on appeal.").

In an effort to justify raising this issue for the first time in the court of appeals, petitioners asserted that a failure to comply with the statute of limitations in Section 6532(b) deprives the district court of subject matter jurisdiction over the government's case (Pet. App. 7a)—a defense that may be raised at any time. But Section 6532(b) does not create a jurisdictional bar to an untimely suit. A statute of limitations "[o]rdinarily" represents an affirmative defense to a cause of action, not a jurisdictional bar to an untimely suit. *Dieckmann* v. *United States*, 550 F.2d 622, 623 (10th Cir. 1976). When a statute is expressly worded to bar an untimely "suit or proceeding" against the United States, it has been held to create a jurisdictional bar to the untimely action. *Ibid.* But a statute such as Section 6532(b)—that bars only the "[r]ecovery" on an untimely suit (26 U.S.C. 6532(b)) —is a limitation on the cause of action, not on the jurisdiction of the court. A defense based on a statute that is a "limitation on the remedy, not on the right to bring the action, * * * must be pled as an affirmative defense in compliance with Fed.R.Civ.P. 8(c)." *Mumbower* v. *Collicot*, 526 F.2d 1183, 1187 n.5 (8th Cir. 1975). A failure to plead the defense constitutes a waiver, and the defense may not thereafter be asserted for the first time on appeal. *Davis* v. *Bryan*, 810 F.2d 42, 44 (2d Cir. 1987); *Hodgson* v. *Humphries*, 454 F.2d 279 (10th Cir. 1972).[13]

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[13] Even if the statute of limitations contained in Section 6532(b) were jurisdictional in nature, petitioners could not prevail on the facts of this case. Petitioners admitted that the

(ii) Under Section 6532(b) of the Internal Revenue Code, recovery of an erroneous refund is allowed if the suit is brought within two years "after the making of such refund" (26 U.S.C. 6532(b)). The court of appeals correctly held (Pet. App. 10a) that the date that the funds are delivered to the taxpayer, rather than the date that the refund check was issued or mailed, is the date a "refund" is made for purposes of Section 6532(b). In explaining that same conclusion in *Paulson* v. *United States*, 78 F.2d at 99, the court stated:

> Refund means to pay back, return, restore, make restitution. That is the ordinary and popular concept of the word, and in the absence of a contrary indication, it must be presumed that the Congress used it in the generally accepted sense. The return, restoration, and restitution of the money is made when the check in payment of the obligation is delivered.

The holding of the court of appeals draws ample support from the decision of this Court in *United States* v. *Wurts*, *supra*. The question in *Wurts* was whether the two-year period for bringing suit for an erroneous refund begins when the refund is administratively allowed or when it is paid. 303 U.S. at 415. The suit in *Wurts* had been brought less than two years after the refund check was mailed but more

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amounts involved in this case were "refunded" by the United States on July 9, 1990 (J.A. 62a, 64a) and the suit was commenced exactly two years later. There is no proper basis for petitioners now to attempt to contradict their stipulation—by raising new factual contentions on appeal—for they stipulated in the district court that there were "no factual issues in dispute in this litigation" (Pet. App. 39a).

than two years after the refund was approved by the Commissioner. Noting that words in statutes are to be given their common meaning, the Court explained that the common meaning of "refund" is "to return (money) in restitution, repayment." *Id.* at 417. The Court noted that administrative allowance of a refund "does not finally establish a claimant's right to a refund and does not preclude further investigation and consideration of the claim." *Ibid.* In particular, a refund may be cancelled "even after a check was signed and mailed." *Id.* at 417-418. The Court therefore held that the statute of limitations runs from the date of payment and not from the date on which the refund is administratively allowed.

Petitioners assert (95-966 Pet. Br. 37) that, when this Court stated in *Wurts* that the limitations period "begins to run from the date of payment" (303 U.S. at 418), it meant from the date of mailing. That contention is plainly incorrect. Nothing in the Court's opinion in *Wurts* supports the notion that the Court equated the date of payment with the date of mailing. To the contrary, the Court stated that a refund is not made, because it may be cancelled, "even after a check is signed and mailed." 303 U.S. at 417-418.

Noting that a refund is not actually made until the funds are delivered to the taxpayer, other courts have consistently applied the analysis of *Wurts* to reach the same conclusion reached by the court of appeals in this case. For example, in *United States* v. *Carter*, 906 F.2d 1375 (1990), the Ninth Circuit rejected the argument presented by petitioners in this case, holding that "[t]he refund is considered to have been made on the date the taxpayer received the refund check." *Id.* at 1377. Numerous other decisions are in accord. See, *e.g.*, *United States* v. *Woodmansee*, 388 F. Supp.

36, 46 (N.D. Cal. 1975), rev'd on other grounds, 578 F.2d 1302 (9th Cir. 1978); *Akers* v. *United States*, 541 F. Supp. 65, 67 (M.D. Tenn. 1981) ("[t]he operative date in relation to the statute of limitations [of Section 6532(b)] is not the date of the check's issuance, but the date on which the check was received by the taxpayer"); *United States* v. *Bruce*, 642 F. Supp. 120, 122 (S.D. Tex. 1986) (same). Professional commentary has also reached the same conclusion. See, *e.g.*, 14 *Mertens Law of Federal Income Taxation* § 54A.69 (Lisa Fagan, *et al.* eds., 1996) (erroneous refund suit must be brought "within two years of the date of delivery of the refund check"); Michael Saltzman, *IRS Practice and Procedure* ¶ 14.08[2][g], at 14-60 (2d ed. 1991); Rita A. Cavanagh & Gerald A. Kafka, *Litigation of Federal Tax Controversies* § 20.03, at 20-9 (1994).

This Court has frequently stated that statutes of limitations on the claims of the United States must be strictly construed in favor of the government. See, *e.g.*, *Badaracco* v. *Commissioner*, 464 U.S. 386, 391 (1984); *Dupont DeNemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924). Indeed, in interpreting the predecessor of Section 6532(b), the Court emphasized that "[t]he Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has 'clearly manifested its intention' to raise a statutory barrier." *United States* v. *Wurts*, 303 U.S. at 416, quoting *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886). Section 6532(b) contains no clear manifestation of intent for a "mailing" to be regarded as a "refund."

Ignoring that the text of the statute must be strictly construed, petitioners assert (Br. 36, 38-41)

that treating a "mailing" as if it were a "refund" would be supported by common sense and by "practical" considerations. In fact, however, common sense and practicality point the other way. If, as petitioners assert, a "refund" is made simply by the act of placing a check in the mail, the Commissioner arguably could recover an erroneous "refund" even if the check were lost and never actually received by the taxpayer. The Commissioner could also refuse to issue a replacement refund check even if it were established that, after mailing, the original refund check was destroyed through no fault of the taxpayer. Neither of these results would comport with common sense.

Under the consistent view of the courts and commentators, and under this Court's decision in *Wurts*, a "refund" is not made for purposes of Section 6532(b) until the funds are delivered to the taxpayer. Under that straightforward application of the plain text of the statute, the government's suit for recovery of the refund was timely in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
KENNETH L. GREENE
KENNETH W. ROSENBERG
Attorneys

JUNE 1996

Supreme Court, U.S.
FILED
JUL 17 1996
CLERK

Nos. 95-966 and 95-977

In The

Supreme Court of the United States

October Term, 1995

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

KELLY M. O'GILVIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER KELLY M. O'GILVIE

LINDA D. KING
6135 E. Central
Wichita, Kansas 67208
(316) 686-2000
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. CONSTRUCTION AND INTERPRETATION OF I.R.C. §104(a)(2)

A. INTRODUCTION

The Brief for the United States gives no assistance in resolving the questions of interpretation before this Court. The discussion of ambiguity is conspicuous by its absence. The IRS notes but makes no argument and gives no authority for the application of a "default rule" before the determination of ambiguity or before the interpretation of intrinsic evidence. Neither does the IRS support or argue for the demotion of its own Treasury Regulation to a mere additional regulatory requirement as this Court found necessary in *Schleier*. The IRS argues only the outcome of the cases in *CIR v. Schleier*, 515 U.S. ___, 115 S.Ct. 2159, 95-1 USTC ¶ 50,309 (1995); *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990), 90-2 USTC ¶ 85,713 (1990); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), cert. denied, 115 S.Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994), 94-1 USTC ¶ 50,232 (Fed. Claims 1994); *Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995), 94-1 USTC ¶ 50,130, reh'g denied, 1995 U.S. App. LEXIS 12,574; and *O'Gilvie v. United States*, 66 F.3d 1550 (10th Cir. 1995), 95-2 USTC ¶ 50,508; and does not address the issues that bring this case before this Court; namely, the inconsistent underlying methods by which each of these courts reached their decisions.

The IRS expresses no philosophical or legal discomfort in relying on the decision of this Court in *Schleier* with its underlying premise that the statute is *plain* while arguing simultaneously that the statute "is not free of ambiguity" in order to invoke a "default rule." (Brief for United States at page 16.) If the statute is *plain*, as this Court found in *Schleier*, then no further interpretation, including application of a "default rule," is necessary. If the statute is *ambiguous*, as this Court found in *Burke v.*

United States, 504 U.S. 229, 112 S.Ct. 1867, 92-1 USTC ¶ 50,254 (1992), 112 S.Ct. 1867, then the mandate to strictly construe exclusions in favor of the government requires that the court determine whether there is a "clear Congressional intent to exclude." An automatic "default" finding in favor of the government upon a determination of ambiguity is error. This error is the fundamental flaw of the recent decisions of the appellate courts. (*O'Gilvie*, *Hawkins*, *Reese*, *Wesson*, and *Miller*.) Strict interpretation of an ambiguous exclusion to tax requires interpretation of relevant extrinsic evidence to discern whether there is a "clear Congressional intent to exclude."

B. RATIONALE v. INTENT

1. At pages 18 and 19 of the Brief for the United States, the confusion between the RATIONALE behind the statute and the INTENT of the meaning of the words continues. Perhaps the IRS is unaware of the distinction or perhaps such confusion serves the purposes of the IRS. In any event, there is a clear and critical distinction between rationale and intent in the area of statutory interpretation.

Evidence of rationale, that is, the underlying reason or reasons the Enactors wrote the words, can be admitted as evidence only if the statute is ambiguous and then for only one purpose and no other. That solitary purpose is to give evidence of what the writers of the words meant the words to say at the time the words were written and under the circumstances at the time. *Heydon's Case*, 3 Co. Rep. 72, 76 Eng. Repr. 637 (1584); *Youakim v. Miller*, 562 F.2d 483 (7th Cir. 1977); *Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Programs, U.S. Dept. of Labor*, 606 F.2d 1324 (DC Cir. 1979). All other uses of evidence of rationale are improper.

2. The IRS and a number of courts reason that the Enactors wrote the words because the Enactors believed the amounts were not taxable because they were not income. *Miller v. Commissioner*, 93 TC 330 (1989); *Miller*, 914 F.2d 586; *O'Gilvie*, 66 F.3d 1550; and *Downey v. Commissioner*, 97 TC 150 (1991). (See also *Eisner v. Macomber*, 252 U.S. 189.) That belief is properly termed a RATIONALE. Assume for this discussion that the original INTENT of the Enactors in writing this statute was to exclude those amounts the Enactors believed were not income in response to that RATIONALE as the IRS argues. The words the Enactors wrote effectively excluded those amounts, "the amount of any damages received," from tax at that time. The words the Enactors wrote expressly *exclude*, but do not express, in words, any rationale for excluding. Review of the RATIONALE to determine what the words meant at the time written *is* a proper use of the evidence of rationale *if* the statute is ambiguous.

Later courts determined that there was a flaw in the alleged RATIONALE of the Enactors. The IRS cites 1956 as the year and *Commissioner v. Glenshaw Glass*, 348 U.S. 426, 75 S.Ct. 473, 211 F.2d 928 (1955), reh'g denied, 349 U.S. 925 (1955) as the case that shows this flaw. Because "lost wages," "profits," and "punitive damages" when received in a personal injury suit were then included in the definition of gross income, the IRS tried to substitute the underlying RATIONALE for what the Enactors INTENDED the words to say at the time written. The IRS' argument, stripped bare, says, in effect, if the Enactors knew what we know now, they would never have written these words. Or more insidiously, that because the IRS believes that the Enactors' underlying rationale was based on a legal fact shown to be incorrect in 1956, the

meaning of the words changed. The RATIONALE of the Enactors' did not change, and neither did the words.

Even if the surmise of the IRS were correct that the controlling rationale was based on a now incorrect legal fact, then evidence of that rationale is permitted for only one purpose and no other, to show the INTENT of the words of the statute. The confusion and the misuse of evidence of rationale occurs when the IRS forwards the rationale as the equivalent of Congressional intent.

3. The IRS' discussion of intent and rationale ignores the very strong probability that the Enactors well knew of the controversy of whether lost wages, profits and punitive damages were taxable, as is evidenced by the actual text of the statute itself. (See discussion about prior tax codes and Sixteenth Amendment in 95-977 Pet. Br. – Kelly M. O'Gilvie, page 26.) If the Enactors had had no doubt that the amounts were not income, they would have had no need to write an unnecessary statute. The existence of the statute gives evidence that the Enactors, or at least some of them, believed recovery of lost wages, lost profits and punitive damages were otherwise taxable. The very words of the House Committee on Ways and Means, H.R. Rep. No. 767 at 9-10 (1918), (herein Committee Report) (For text see 95-977 Pet. Brief – Kelly M. O'Gilvie, at page 25,) relied upon by the IRS, written at a time when revenue laws were actually written by the Congress and not an administrative agency, indicate that there is a *controversy* about *whether* such damage awards were income. *Miller*, (TC); *Miller*, (4th Cir.); *Downey*, (TC); *O'Gilvie*, (10th Cir.). (See also *Eisner v. Macomber*, 252 U.S. 189 (1918).)

The Enactors resolved that controversy by an affirmative act. They wrote and made into law §213(b)(6) which carried out a Congressional social policy of tax relief for the injured and bereaved. (See discussion in

95-977 Pet. Br. – Kelly M. O'Gilvie, page 25.) The evidence of the awareness of Congress of the controversy of whether or not the amounts were otherwise taxable is so strong in the Committee Report and the very act of writing the statute itself, that the weaker implications and surmises that Congress had other purposes and rationales cannot control the interpretation. *Skelly Oil Co. v. U.S.*, 255 F.Supp. 288 (ND Okla. 1966).

4. Although there is no support in the text of the statute or in the Committee Report, the IRS forwards a third rationale, intertwined with the first, as the "underlying purpose" of the statute. This third rationale is a "return of capital," "underlying compensatory purpose," or now "conversion of capital" rationale. (Brief for the United States, 18-19.) The IRS reads into a 1920 IRS decision the words "return of capital" that are not present. And the IRS' reliance on *Doyle v. Mitchell Bros.* is incomprehensible. That case involves the question of whether a gain on sale of stumpage, purchased before the 1918 tax law was enacted but sold after the law passed, was gross income. *Doyle v. Mitchell Bros.*, 247 U.S. 179 (1918). The question answered by that court and by the Attorney General's opinion cited in conjunction was whether amounts were includable in gross income because they were a return of capital. No exclusion was at issue in those opinions.

The most authoritative extrinsic evidence, besides the statute itself, is the House Committee on Ways and Means Report, in which Congress explained the rationale behind the exclusion. That Committee Report contains no mention or reference to a "return of capital" rationale, instead the Committee Report expresses only the doubt that such amounts would be required to be included in income.

A rationale is competent evidence only of the intent of the original Enactors at the time the statute was written and then, only if the statute is ambiguous. There is strong evidence that the "not otherwise taxable" rationale and the tax relief for the injured and bereaved rationale are primary. There is no direct evidence of the IRS' suggestion of a return of capital rationale. The IRS here seeks to substitute one rationale – return of capital – for the intended meaning of the words. Such a use of rationale is impermissible.

5. The "return of capital" theory has been rejected repeatedly as the underlying rationale in §104(a)(2). (See discussion in *Petition for Certiorari – Kelly M. O'Gilvie,* pages 22-24, and page 23, footnote 2.) Inquiry into the nature of the underlying claim is not unique. See *Tygart Valley Glass Co.*, 16 TC 941 (1951); *Spangler v. Comm.*, 323 F.2d 913 (9th Cir. 1963); *Carter's Estate v. Comm.*, 298 F.2d 192 (8th Cir. 1962); *Sanders v. Comm.*, 225 F.2d 629 (10th Cir. 1925). The source of the underlying claim has long been the approved test.

6. The mere fact that the IRS relies on *Glenshaw Glass* as authority for a change in the interpretation of §104(a)(2) shows conclusively it was the belief that these amounts were *not includable in income* that was overcome in that case. Punitive damages were never believed to be a *return of capital,* the matter was never litigated and *Glenshaw Glass* had nothing to do with confirming that punitive damages were not a return of capital.

7. There is no showing that the Enactors did not understand that damages, including lost wages, profits and punitive damages might otherwise be taxable. The tax code of the time included in gross income, income "from whatever source derived." (See discussion in 95-977 Pet. Br. – Kelly M. O'Gilvie, page 26.) *Glenshaw Glass* did not repeal the current law, but only affirmed the

broad sweep of the statutory language that was in effect in 1918. (See discussion in 95-977 Pet. Br. – Kelly M. O'Gilvie, pages 30-32.)

8. The diverse rationales of a Congress of many diverse representatives who participate in drafting and enacting a statute cannot ever be known and estimations of those rationales are merely an aid to interpretation of INTENT at the time of enactment. The very existence of the statute is evidence that those Congressmen believed that there was a need for exclusion from tax of amounts that might otherwise be taxable. The act of excluding *any income* from tax gives tax relief to some taxpayers. The rationale of providing tax relief for the injured and bereaved is manifest in the statute itself. (See Holmes, Collected Legal Papers, p. 207 (New York 1920)).

C. DEFAULT RULE

1. Rigorous inquiry into the "intent of Congress" assures the full expression of the purposes of our government's legislative branch and full enforcement of that expression. Premature application of a "default rule" in favor of the government is a suppression of that Congressional intent. The Tenth Circuit found that the statute, §104(a)(2), is susceptible to two meanings and therefore must succumb to the "default rule." The "principle of narrow construction" is not a "default rule" that relieves the court from comprehensive review of extrinsic evidence. The "principle of narrow construction" requires that the intent be discerned from the careful analysis of *all* extrinsic evidence and that a clear Congressional intent to *exclude* is evidenced.

2. An ambiguous statute *does not* trigger a "default rule" in favor of the government. The words "any damages . . . received on account of personal injuries," can express that clear intent, whether by plain meaning *or*

from interpretation of extrinsic evidence. *Crane v. Commissioner*, 331 U.S. 1 (1947). The inevitable consequence of such a premature application of a "default rule" is the denial of the full expression and enforcement of the intent of Congress. (See full discussion in 95-977 Pet. Br. – Kelly M. O'Gilvie, pages 8-15.)

D. GLENSHAW GLASS

1. At page 20 of the Brief for the United States, the IRS boldly states that, "This court reviewed much of *this same legislative and administrative history* in *Commissioner v. Glenshaw Glass*." The *same* legislative and administrative history to which the IRS refers is totally irrelevant to the decision of this court in *Glenshaw Glass*. The IRS obviously attempts to bolster the significance of footnote 8 in *Glenshaw Glass* upon which it relies.

The question in *Glenshaw Glass* was whether the definition of gross income was broad enough to encompass punitive damages. This Court determined that the definition of "any income derived from any source whatsoever" (basically unchanged since 1913, Tax law of 1913, Section B, lines 1-19) was broad enough to encompass even punitive damages. (See discussion in 95-977 Pet. Br. – Kelly M. O'Gilvie, page 26.) The legislative and administrative history of the §104(a)(2) exclusion had no precedential or persuasive authority in the decision that this Court reached in *Glenshaw Glass*.

2. In its brief the IRS relies on footnote 8 in *Glenshaw Glass* for the proposition that "[d]amages for personal injury are by definition compensatory only." In the facts of *Glenshaw Glass*, there was no award for personal injury and no exclusion before the Court. In addition, this statement is directly contrary to the

comprehensive list of damages, including lost wages and punitive damages, which characterize a personal injury tort claim. *Burke*, 112 S.Ct. at 1870-1872.

ERRATTA. Petitioner's brief states that in *Glenshaw Glass*, the Court makes the statement that "unless otherwise excluded, punitive damages are taxable." This is incorrect. Petitioner's counsel apologizes to the opposing counsel and to this Court. The phrase "except as otherwise provided" is actually found at I.R.C. §61(a).

3. If footnote 8 in *Glenshaw Glass* is examined closely, it is evident that the writer based his statements upon an incorrect assumption. That incorrect assumption is that punitive damages were excluded under §104(a)(2) *because* punitive damages were believed to be a **return of capital**. The legislative history of §213(b)(6), and §104(a)(2), and the decisions of the courts which have addressed this issue, (*O'Gilvie* (10th), *Miller* (4th), and *Downey* (TC)), have affirmed that punitive damages were believed NOT TO BE INCOME. There has never been a considered opinion that suggested that punitive damages were believed to be a return of capital.

In footnote 8, this Court in *Glenshaw Glass* did acknowledge that punitive damages are excluded under §104(a)(2). The logical inference that may be drawn from the fact that punitive damages were excluded and they are *not* a return of capital is that the theory or rationale of *return of capital* cannot be the sole rationale for the exclusion.

E. STARRELS

The Ninth Circuit in *Starrels v. C.I.R.*, 304 F.2d 574 (1962), finds that the §104(a)(2) " . . . exemption is allowed for damages which have already occurred. There is no suggestion of any exception for amounts paid for possible future damages." *Starrels* at 576. The "injury" for

which she had been paid had not yet occurred to Mrs. Starrels. The issue of punitive damages was not before the court in *Starrels*. The comments about making the taxpayer whole from a previous loss of personal rights goes to the threshold finding that there was no tort, and therefore nothing to recompense. The discussion about restoration of capital is not made with punitive damages at issue and is therefore *dicta* with reference to punitive damages.

F. TITLE

1. As a matter of sound policy, I.R.C. §7806(b) applies to Title 26, the Internal Revenue Code, a part of the Federal Code that has been built piecemeal over nearly a century. The various square peg tax provisions enacted yearly since 1913 have been tucked into whatever round hole they can best be made to fit. For example, here the relationship between the *type of claim* (personal tort claim) that would generate **both** *compensation* from insurance, workman compensation, and a *damage award* in litigation or settlement of litigation was the connecting point for the original §213(b)(6), which then became §104(a)(1), §104(a)(2), and §104(a)(3). (See discussion concerning "personal injury and sickness" as the object of two prepositional phrases at page 16 herein.) The *type of damage awarded* (compensatory) was not the connecting point for organization of this statute which had now been cut into parts.

2. As pointed out in 95-966 Brief of Petitioners Stephanie O'Gilvie and Kevin O'Gilvie, at pages 16-18, and acknowledged by the IRS at page 19 of the Brief for the United States, the title of §104, "Compensation for injuries or sickness" was not contained in the original enactment of the statute as §213(b)(6) of the Revenue Act of 1918. *That title* has no relevance or interpretive value in

the determination of the original meaning intended by the Enactors in the words they wrote in 1918.

3. That title was given to the section in 1939. IRS seeks to have significance assigned to the title by the reenactments of Congress. IRS' argument is incomplete, for along with that title, Congress reenacted the administrative and caselaw interpretation of the section as *excluding lost wages, lost profits and punitive damages*. (See *Petition for Certiorari – Kelly M. O'Gilvie* pages 17-24.)

4. The IRS' description of the authority upon which it relies for the proposition that "the title of a statute or section can aid in resolving ambiguity in the legislation's text" is misleading and unpersuasive here. The case of *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991) involves the interpretation of federal statute, Title 8, which was written as a unified whole, enacted at one time, and in which the title and organization were part of the original enactment. Also very importantly, interpretation of the provisions of Title 8 of the federal code by reference to "location or grouping" is *not prohibited by statute*. In contrast, 26 U.S.C. §7806(b) expressly prohibits such interpretation of the "contents of this title (Title 26.)" The interpretation of the provision in Title 8 by this court in *INS, supra*, was not under any similar statutory prohibition.

5. Likewise, the reference to the case of *Maguire v. Commissioner*, 313 U.S. 1, is misleading and unpersuasive. The IRS flatly states that the case stands for the proposition that *administrative title is determinative of meaning*.

> That *same conclusion* has been reached by this court in cases arising under the internal revenue laws. *Maguire v. Commissioner*, 313 U.S. 1, 9 (1941) ("the title of an act***may be of aid in resolving an ambiguity") (Brief for the United States, page 21, footnote 6.) (Emphasis added.)

In *Maguire,* this Court did not interpret the meaning of a statute from an administrative label or title as *INS v. National Center for Immigrants' Rights, supra,* case, or as the Court is asked to do here, but instead it considered the title of an ACT OF CONGRESS. The title of that act was given by the enacting Congress as part of the drafting and legislative process. The title of a House or Senate Bill that is enacted as law is not the equivalent of a label or title given by the administrative agency years after enactment. It can reasonably be said that the title of the ACT OF CONGRESS given by the Enactors is evidence of the intent of those Enactors. It is, however, significant to note that in *Maguire,* this Court expressed that the interpretive value of a title is limited even when that title is bestowed by the enacting Congress. *Maguire,* 313 U.S. 1, 9.

6. As a matter of common sense and sound statutory construction, the title given to a section for administrative purposes 21 years after enactment cannot be found relevant to the interpretation of the intent of the original Enactors. If the reenactment of the title of the section without change is to be given any weight, then the identical reenactments of the section interpreted as excluding lost wages, lost profits and punitive damages must be given the same weight. (See detailed discussion in *Petition for Certiorari – Kelly M. O'Gilvie* at pages 17-24.)

The groupings, arrangements, administrative titles, and other methods used by the administrative agency to organize the unwieldy body of law that has developed in a piecemeal fashion over decades cannot then be used by that same administrative agency as *primary evidence* of its position in litigation. The theory is that Congress will make the laws and the IRS will, in turn, enforce them.

G. AMBIGUITY

1. Beginning at page 23, item 3, sections (a) and (b) of the Brief for the United States, the IRS details an argument about the meaning of the separated words and phrases in the statute. This piecemeal argument misses the mark. The ambiguity in §104(a)(2) is not in the meaning of the disjuncted words "any damages" and "on account of personal injuries or sickness," as the IRS' argument suggests. The ambiguity in §104(a)(2) is a patent structural ambiguity. The entire sentence can be read to mean two different things. (See detailed discussion in 95-977 Pet. Br. – Kelly M. O'Gilvie, pages 16-19.) Both meanings are equally "clear," but the sentence cannot mean both things at the same time.

2. Those two distinct meanings have been fully articulated. The first in time, was expressed in the original statute, and in the Treasury Regulation 1.104-1(c), by the IRS in Rev. Rul. 75-45, by the Sixth Circuit in *Threlkeld v. C.I.R.*, 848 F.2d 81 (6th Cir. 1988) and *Horton*, the Sixth Circuit and this Court in *Burke*, as well as by numerous lower courts. *Pistillo*, 912 F.2d 145 (6th Cir. 1990); *Burke*, 929 F.2d 1119 (6th Cir. 1991); *O'Gilvie*, 92-2 USTC ¶50,567 (D. Kan. 1992); *Hawkins*, 93-1 USTC ¶50,208 (D. Ariz. 1993); *Horton*, 100 TC 93 (1993); *McKay*, 102 TC 465 (1994); *Bennett*, 30 Fed. Cl. 396 (1994); *Miller*, 93 TC 330 (1989); *Threlkeld*, 87 TC 1294 (1986); *Metzger*, 88 TC 834 (1988); *Downey*, 97 TC 150 (1991). See also *Hawkins*, 30 F.3d at 1085, dissent of Judge Trott.

This first interpretation requires that the language "any damages received . . . on account of personal injury," limit the exclusion to damages where the ***type of claim*** from which the award is made is personal injury and "that is the beginning and the end of the inquiry." *Burke*, 112 S.Ct. at 1869.

The second meaning was first articulated by the IRS with regard to punitive damages in the Rev. Rul. 84-108, and followed by the Fourth Circuit in *Miller* and its progeny. That interpretation is that the words of §104(a)(2) require that the ***type of damages*** excluded be limited to only those damages awarded for compensation for, or as a return of capital for personal injury.

The interpretation that the language of the provision requires that the ***type of damages*** be limited to only those damages awarded as a return of capital for personal injury (in the context of §104(a)(2)) was first promoted by the IRS with regard to lost wages and profits in 1972. The IRS argued that because the taxpayer was made more than whole, that is the wages or profits were not a return of capital and would have been taxable had the taxpayer received them in employment, then the requirement to be "on account of personal injury" was not met. This argument was repeatedly rejected and those holding approved by this Court. *Burke*, 112 S.Ct. 1871. (See *Petition for Certiorari – Kelly M. O'Gilvie* at pages 22-24.)

3. The test for ambiguity is surely met when reasonable persons, including at least five panels of Federal Judges, Supreme Court Justices, numerous panels of lower courts Judges, and members of Congress in their legislative role (1989 Amendment) differ as to the interpretation of the provision.

4. The courts have been little aided by counsel in putting this ambiguity into perspective. There has been no clear articulation of the exact nature of the ambiguity in the briefs filed or the cases decided until this time. The IRS and even counsel for the Petitioners in the consolidated case here argue the disjuncted pieces of the statute.

Petitioner most respectfully asserts that this Court is incorrect in its finding in *Schleier* that §104(a)(2) is plain and unambiguous. Petitioner asks that the finding made

by this Court in *Burke* that the statute is ambiguous be reaffirmed.

H. INTERPRETATION

1. Plain words of original statute.

The Petitioner agrees with the IRS' statement that proper construction of a statute requires reading the statute as a whole and not piecemeal. *Crane v. Commissioner*, 331 U.S. 1 (1947). The original whole is §213(b)(6). (Revenue Act of 1918, ch.18, §213(b)(6), 40 Stat. 1066 (1919).)

> ***Amounts received*** through accident or health insurance or under workmen's compensation acts, ***as compensation for personal injuries or sickness***, plus ***the amount of any damages received*** whether by suit or agreement ***on account of such injuries***.

The subject of the first clause is the phrase "amounts received as compensation" and the subject of the second clause is the phrase "the amount of any damages." Nothing in the written text of the section requires the "amount of any damages" in the second clause to be "compensation." Despite the IRS' many unsupported protestations to the contrary, the language of the original statute clearly and unmistakably distinguishes between *"amounts received as compensation"* for personal injury or sickness and *"the amount of any damages received"* for such injuries.

The IRS' discussion about the original statute in its brief at pages 27 and 28, does not draw the reader's attention to any *reasons* that the word "compensation" in the first clause might limit or modify the word's "amount of any damages" in the second. The IRS merely states that the "Petitioners seek to tear asunder words that the statute has joined together," and repeats its own conclusion several times. The IRS' unsupported and conclusory assertions do not change the text of the provision.

The two independent clauses of the original statute have two distinct subject clauses: the first, "amounts received as compensation" and the second, "the amount of any damages." These two independent clauses have only the *object of a prepositional phrase* in common; "for **personal injuries or sickness**" in the first clause and "on account of **such injuries**" in the second. There is no conceivable reading of the statute that would permit the word "compensation" to modify any part of the second clause. The word "compensation" is inextricably bound to the words which precede it and is unavailable to modify the words which follow.

2. Treasury Regulation.

The IRS had no authority to issue quasi-legislative Regulations for §213(b)(6) (1918) or any of its successors and none has been cited. Treasury Regulation §1.104-1(c) was issued only to *interpret the statute* for taxpayers and IRS staff. Without special authority to issue a quasi-legislative Regulation, the Regulation has no authority as an "additional administrative requirement;" as was found in the *Schleier* decision. The IRS has not amended nor repealed the extant Treasury Regulation.

3. 1989 Amendment.

a. The IRS' argument in its Brief at footnote 8, page 26, that ". . . they are the 'masters of the subject' " and that rules should be written by them is troubling at best but does reflect the view taken by the IRS of its role as lawmaker. The IRS here has failed to distinguish between rules necessary to interpret and enforce Congress-made laws and the authority of the IRS to make the law. The IRS asks deference to its Revenue Rule as law instead of seeking interpretation of the Congress-made law. (Brief for United States page 26.) This is improper. The IRS

litigation position has little interpretive value and is certainly not law. This statute must be interpreted with a firm eye on the intent of the enacting Congress and reenacting and amending Congresses as the law makers.

b. At a minimum, the 1989 Amendment to §104(a)(2) shows that the members of Congress who enacted the Amendment, and who may be presumed to be reasonable persons, believed that the statute excludes punitive damages. This supports the view that the statute is ambiguous in its current form.

c. At page 29 of its brief, the IRS asserts that this Court has long rejected the argument that an amendment to the tax laws provides evidence that the law was formerly otherwise. *Higgins v. Smith*, 308 U.S. 479, 480. The IRS is mistaken and the *Higgins* case is inapplicable here. In *Higgins*, the old law had been changed and the new provision was unambiguous. Here, the law is unchanged and it is the meaning of an ambiguous statute that is sought.

> The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it.

Hamilton v. Rathbone, 175 U.S. 219, 221. See also *U.S. v. Bowen*, 100 U.S. 508. There has been no argument made here that the substantive law has been changed.

> The whole doctrine applicable to the subject may be summed up in the single observation

that prior acts may be resorted to, to *solve*, but not to *create*, an ambiguity. *Hamilton* at 222.

d. The use of the later enactments to clarify previous law is *not* prohibited as the IRS asserts. This use of later enactments has been approved and demonstrated in the case of *Hamilton v. Rathbone*, 175 U.S. at 421 to 423; *United States v. Community TV, Inc.*, 327 F.2d 797 (10th Cir. 1964); and this Court in *Burke*, 112 S.Ct. 1871, fn. 6, and 1876, fn. 3, to clarify an ambiguous statute. (See detailed discussion in 95-977 Pet. Br. – Kelly M. O'Gilvie, page 39.)

e. The admonition that "the view of a subsequent Congress forms a hazardous basis for inferring the intent of an earlier one" is apt. However, that admonition goes only to the use of the views of later Congresses for inference of intent of the enacting Congress and does not prohibit review of the statute for other purposes in appropriate circumstances. The Court is vested with the discretion to determine what extrinsic evidence may be brought to bear on the question of an ambiguous statute and what weight to give that evidence.

There are other factors here that indicate that careful consideration should be given to the 1989 Amendment of this statute as this Court did in *Burke*. The reenactments and amendments of later Congresses with the interpretation of the statute as limiting only the *type of claim* is not an attempt to infer the intent of the Enactors, but are surely relevant to the question of Congressional approval of long standing administrative practice and approval of relevant case law. Perhaps most important, the interest of the public in a consistent and cohesive body of law is great and the power of the Congress to make law is predominant.

I. SUMMARY OF §104(a)(2)

1. Ambiguity requires a choice between two. The choice here is clear. Either the words were originally intended to mean 1) that the *type of claim* is limited to a personal injury claim and any damages that flow from that claim are excluded (Treas. Reg. 1.104-1(c); *Horton*, 33 F.3d 625; *Burke*, 504 U.S. 229; or 2) that the *type of damages* excluded is limited to only those damages received as compensation for personal injury. (*Miller, supra*; and progeny.) Application of both tests at once is untenable. Cf. *Rice v. United States*, 834 F.Supp. 1241 (E.D. Cal. 1993); and *C.I.R. v. Schleier*, 115 S.Ct. 2159.

2. The ambiguous statute must be interpreted from extrinsic evidence to discern the "intent" of the words written and not the possible rationales. If that interpretation evidences a "clear intent to exclude," then the requirement that the exclusion be "narrowly construed" is satisfied. The fisc is properly and adequately protected by the requirement that "clear Congressional intent to exclude" be found. An additional "default" rule is an insurmountable obstacle that suppresses genuine Congressional intent. That clear intent is evident in §104(a)(2) not only in the words of the original Enactors and in the Treasury Regulation but also the reenactments and amendment of the subsequent Congresses with the interpretation *that the relevant inquiry is into the source of the underlying claim* and that is the "beginning and the end of the inquiry." Judicial and administrative legislation to *correct* tax policy denies Congress' authority and power to make law.

II. IMPERMISSIBLE EXPANSION OF JUDICIAL AUTHORITY TO MODIFY JUDGMENTS – F.R.C.P 60(a)

The Petitioner has already thoroughly argued the application of the Federal Rules of Civil Procedure law to show that the IRS did not file its notice of appeal timely. If the Judgment of November 30, 1993, was amended under Rule 60(a) then there was no tolling of the time in which to file the notice of appeal. No motion was made that the Judgment be amended. This is certain. The Judgment was *amended* by the district court. That is certain. There is no other Federal Rule except Rule 60(a) under which the district court had authority to amend a Judgment on its own motion. The district court must have amended its Judgment under some authority outside the Federal Rules of Civil Procedure, or the IRS did not timely file their appeal.

Respectfully submitted,

LINDA D. KING, Counsel
6135 E. Central
Wichita, Kansas 67208
(316) 686-2000

(9) (8)

Nos. 95-966, 95-977

Supreme Court, U.S.
FILED
JUL 17 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE, minors,

Petitioners,

-and-

KELLY M. O'GILVIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE, MINORS

STEPHEN R. McALLISTER
Of Counsel
University of Kansas
School of Law
Green Hall
Lawrence, Kansas 66045
(913) 864-4550

ROBERT M. HUGHES
Counsel of Record
GREGORY L. FRANKEN
DAVID B. SUTTON
BEVER, DYE, MUSTARD
& BELIN, L.C.
Attorneys for Petitioners
Kevin M. O'Gilvie and
Stephanie L. O'Gilvie, minors
106 West Douglas
Suite 700
Wichita, Kansas 67202
(316) 263-8294

8702-A
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTIONS PRESENTED

1. Whether a punitive damages award received by minor children for the wrongful death of their mother in a personal injury lawsuit is excludable from gross income as "any damages received . . . on account of personal injuries . . ." under 26 U.S.C. § 104(a)(2)?

2. Whether the event which commences the two year statute of limitations, 26 U.S.C. § 6532(b), for a suit by the United States to recover a refund erroneously made, should be the issuance or mailing of the refund check by the government or its receipt by the taxpayer?

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ARGUMENT

I. SECTION 104(a)(2) EXCLUDES FROM TAXABLE INCOME THE PUNITIVE DAMAGES AWARD THE O'GILVIE CHILDREN RECEIVED FOR THE WRONGFUL DEATH OF THEIR MOTHER

A. The Tenth Circuit Unnecessarily And Improperly Invoked A "Default" Rule Rather Than Interpret § 104(a)(2)

Like the Tenth Circuit below, the Government in its brief relies on the "principle that exclusions from income must be narrowly construed." Brief for the United States ("U.S. Br.") 9; *see also id.* at 12, 16-17, 32. Petitioners acknowledge that this Court has recognized such a principle. *See, e.g., Commissioner v. Schleier*, 515 U.S. __, __, 115 S. Ct. 2159, 2163 (1995). Petitioners do not agree, however, that the Tenth Circuit properly invoked the principle in this case when that court transformed this general proposition into a so-called "default rule" which, ultimately, was the *sole* basis for the Tenth Circuit's decision. *See* Pet. App. 22a.

In *United States v. Burke*, 504 U.S. 229 (1992), this Court considered the question whether an award of backpay made in settlement of claims under Title VII was excludable from taxable income under § 104(a)(2) as involving a "personal injury." The Court carefully examined the language of § 104(a)(2), the applicable IRS regulations, Title VII and general tort law principles, before concluding that Title VII backpay awards are not excluded from taxable income because they do not redress "tort or tort-type" injuries. *See* 504 U.S. at 233-42. With all due respect, only Justice Souter, in an opinion concurring in the judgment, expressly relied upon the so-called default rule in concluding that § 104(a)(2) should be construed in the Government's favor.[1]

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1. *See id.* at 248 (Souter, J., concurring in the judgment) ("In sum, good

(Cont'd)

In *Schleier*, the Court again considered the application of § 104(a)(2), this time in deciding whether liquidated damages under the Age Discrimination in Employment Act are excluded from taxable income. In concluding that they are not, the Court made clear that it was relying solely on "the plain language of § 104(a)(2), the text of the applicable [IRS] regulation, and our decision in *Burke* . . . ." 115 S. Ct. at 2167. The Court's only reference to the narrow construction principle was a general statement made at the very beginning of its discussion of the issue and which quoted Justice Souter's concurring opinion in *Burke*.[2] The Court did not thereafter purport to apply a "default" rule or otherwise suggest that its invocation was necessary to resolve an ambiguity in the statute.

In *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798 (1994), this Court strongly rejected the argument that RICO should be strictly construed in favor of defendants because of "the rule of lenity in criminal cases." 510 U.S. at __, 114 S. Ct. at 806. The rule of lenity, like the narrow construction principle, favors one class of litigants over another but only when the meaning of a statute cannot be determined after careful and thorough inquiry by a court:

> But the rule of lenity applies only when an *ambiguity* is present; "it is not used to beget one . . . . The rule comes into operation at the *end* of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers."

(Cont'd)
reasons tug each way. It is needless to decide which tug harder, however, for the outcome in this case follows from the default rule of statutory interpretation that exclusions from income must be narrowly construed").

2. *See id.* at 2163 ("We have also emphasized the corollary to § 61(a)'s broad construction, namely the 'default rule of statutory interpretation.' *United States v. Burke*, 504 U.S., at 248, 112 S. Ct., at 1878 (SOUTER, J., concurring in judgment)").

Id. (quoting *United States v. Turkette*, 452 U.S. 576, 587-88 n.10 (1981) (emphasis added)). Indeed, it should be the rare case in which default or narrow construction rules determine the outcome.

Between them, *Burke*, *Schleier*, and *Scheidler* make clear that the Tenth Circuit erred in this case when it relied *solely* on the so-called "default" rule to decide the question whether § 104(a)(2) excludes from taxable income the punitive damages the O'Gilvie Children received for the wrongful death of their mother. Only if the Court remains unable to determine the meaning of the language "any damages received . . . on account of personal injuries," after carefully examining the plain language of the statute, its history, its legislative history, the relevant regulations, and this Court's own decisions interpreting § 104(a)(2), would resort to the narrow construction principle be appropriate. As further demonstrated below, this Court should not find such resort to be necessary in this case.

B. This Court's Decisions Indicate That Punitive Damages Received For Physical Injuries Are "Any Damages Received . . . On Account Of Personal Injuries"

In *Schleier*, this Court declared that two requirements must be satisfied in order to qualify for the exclusion of § 104(a)(2): the taxpayer must establish that (1) the underlying cause of action is based on tort or tort-type rights and (2) the damages were received "on account of" a personal injury. *See* 115 S. Ct. at 2167. There is no dispute that the first requirement is satisfied in this traditional tort case. *See* U.S. Br. 8. The question before this Court is whether the punitive damages in this case were received by the O'Gilvie Children "on account of" personal injuries. This Court's own decisions interpreting the statute strongly suggest that the punitive damages in this case are excluded from taxable income by § 104(a)(2).

The Government begins by correctly observing that in *Schleier* the Court discussed the second requirement — that the damages were received "on account of personal injuries"— in terms of the taxpayer demonstrating that the damages received were "attributable to" the personal injury and that the injury "affected the amount" of the damages received. U.S. Br. 13 (quoting *Schleier*, 115 S. Ct. at 2164). Contrary to the Government's argument, however, the punitive damages the O'Gilvie Children received bear both of those characteristics. Unlike a backpay or liquidated damages award in an ADEA case, the punitive award in this case was made *only* because of the tort committed against the O'Gilvie Children's mother and the resulting physical injuries. In Kansas (the state whose law governed the tort claim) punitive damages are not permissible *unless* there is actual harm to the plaintiff, manifested by either an award of actual (something more than nominal) damages or significant equitable relief.[3] In fact, this is the rule in most jurisdictions.[4] Thus, the punitive award in this case, unlike the ADEA liquidated damages award in *Schleier*, is clearly "attributable to" the underlying injury.

The Government contends that only damages which are legally designated as "compensatory" qualify for exclusion under § 104(a)(2), U.S. Br. 13-16, but this argument is misguided. First, punitive awards generally have a compensatory, as well as punitive, effect and perhaps a compensatory purpose. The edition of Black's Law Dictionary that would have been current when Congress enacted the statute in 1918 says the following about punitive damages:

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3. *See, e.g., Enlow v. Sears, Roebuck & Co.*, 249 Kan. 732, 822 P.2d 617 (1991); *McConwell v. FMG of Kansas City, Inc.*, 18 Kan. App. 2d 839, 861 P.2d 830 (1993); *Capitol Federal Savings & Loan Ass'n v. Hohman*, 9 Kan. App. 2d 217, 675 P.2d 384 (1984), *aff'd*, 235 Kan. 815, 682 P.2d 1309 (1984).

4. *See, e.g.*, W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts* 14 (5th ed. 1984) [hereinafter *Prosser and Keeton on Torts*] ("The greater number of courts have said that [punitive damages] are limited to cases in which actual compensatory damages are found by the jury").

> Exemplary damages are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and *are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong*, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages, and (vulgarly) "smart-money." Black's Law Dictionary 314 (2d ed. 1910) (emphasis added).

Nor does it matter that such awards may redress intangible injuries. In *Schleier*, this Court set forth a hypothetical automobile accident to illustrate the kinds of damages that would be received "on account of personal injuries" and therefore excludable under § 104(a)(2). In so doing, the Court declared that "the portion of the settlement intended to compensate for pain and suffering constitutes damages 'on account of personal injuries.'" 115 S. Ct. at 2164. In a footnote, the Court went on to explain that "[t]hough the text of § 104(a)(2) might be considered ambiguous on this point, it is by now clear that § 104(a)(2) encompasses recoveries based on intangible as well as tangible harms." 115 S. Ct. at 2164 n.4. In many instances, punitive awards may compensate for actual loss that the law would not necessarily otherwise cover,[5] including intangible

5. Under Kansas law, for example, in a wrongful death case, nonpecuniary losses of the survivors are limited by statute to $100,000 per decedent, *i.e.*, if a parent is killed, no matter how many children survive, they as a group can collect only a maximum of $100,000 in nonpecuniary damages. *See* Kan. Stat. Ann. §60-1903(a). Furthermore, under Kansas law, children (Cont'd)

harms, or they may provide a source of funds to compensate the plaintiff's costs of litigation.[6] In *Burke*, this Court recognized that although the broad range of damages available in tort actions "often are described in compensatory terms, in many cases they are larger than the amount necessary to reimburse actual monetary loss sustained or even anticipated by the plaintiff, and thus redress intangible elements of injury . . . ." 504 U.S. at 235 (citations omitted).

Second, the Government's reliance on the unexceptional proposition that punitive damages also serve punitive and deterrent purposes, U.S. Br. 14-16, does not advance the analysis

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have no claim for loss of consortium with a parent who is injured but not killed by the tortious misconduct of another. *See Klaus v. Fox Valley Systems, Inc.*, 259 Kan. 522, 912 P.2d 703 (1996). *See generally Prosser and Keeton on Torts, supra*, at 9 ("Occasional decisions have mentioned *the additional purpose of reimbursing the plaintiff for elements of damage which are not legally compensable, such as wounded feelings or the expenses of suit*") (footnote omitted) (emphasis added); D. Dobbs, 1 *The Law of Remedies* 484 (2d ed. 1993) ("Perhaps the earliest of the modern punitive damages cases were based on a theory of compensation for intangible injury . . . . [O]bservers often believe that added compensation . . . for elements of harm that are not readily calculated, is often one motive for 'punitive' damages awards") (footnotes omitted).

6. *See, e.g., Prosser and Keeton on Torts, supra*, at 12 (Punitive damages "have been defended as a salutary method of discouraging evil motives, *as a partial remedy for the defect in American civil procedure which denies compensation for actual expenses of litigation, such as counsel fees*, and as an incentive to bring into court and redress a long array of petty cases of outrage and oppression which in practice escape the notice of prosecuting attorneys occupied with serious crime, and which a private individual would otherwise find not worth the trouble and expense of a lawsuit") (footnotes omitted) (emphasis added); *The Law of Remedies, supra* at 282 ("The most practical reason to permit such awards is that they fund attorney fees for the plaintiff") (footnote omitted); *see also id.* at 482-84. The Kansas Supreme Court has expressly recognized such a purpose for punitive awards made under Kansas law. *See Brewer v. Home-Stake Production Co.*, 200 Kan. 96, 99-100, 434 P.2d 828, 831 (1967).

here. As this Court has recognized, "[u]nder the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider *the gravity of the wrong* and the need to deter similar conduct." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) (emphasis added). *See generally* Restatement (Second) of Torts § 908, Comments b, c. Indeed, under Kansas law, the trier of fact historically was to consider "the nature, extent and enormity of the wrong, the intent of the party committing [the tort] and generally all the surrounding facts and circumstances" in determining the amount of any punitive award. *Hammargren v. Montgomery Ward & Co.*, 172 Kan. 484, 504, 241 P.2d 1192, 1207 (1952). Moreover, this Court has determined that, as a constitutional matter, both the propriety and the size of punitive awards depends in part on the nature and extent of the harm caused to the plaintiff.[7] The injury to the O'Gilvie Children's mother in this case legally (and obviously) "affected the amount" of the punitive damages award.

For all of these reasons, the natural reading of § 104(a)(2) is that the punitive damages award received in this case is excludable from taxable income. The O'Gilvie Children received punitive damages "on account of personal injuries" because, they are "attributable to" their mother's death, and her death "affected the amount" of the award.[8]

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7. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. __, 116 S. Ct. 1589, 1598-1603 (1996) (discussing the three "guideposts" for ascertaining the constitutionality of a punitive damages award under the Due Process Clause of the Fourteenth Amendment and identifying as the second guidepost "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award, *id.* at 1598); *see also TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993).

8. A number of scholarly commentators have reached the conclusion that the pre-1989 version of §104(a)(2) should be interpreted to exclude from taxable income punitive damages received in a personal injury/tort suit. In reaching that conclusion, these commentators have reviewed and analyzed

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C. The History Surrounding § 104(a)(2), Unlike The Administrative History On Which The Government Largely Relies, Further Demonstrates That Congress Intended What The Statute Plainly Declares

The Government attempts to piece together what it questionably labels the "legislative history" of § 104(a)(2), *see* U.S. Br. 18-20, in support of the Government's current reading of the statute. Only the House Report the Government cites is truly "legislative history" and it does not support the weight the Government would place on it. Indeed, the quoted portion of that report simply declares that "amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, *and damages received* on account of such injuries or sickness," *id.* at 19 (quoting H.R. Rep. No. 767 at 9-10 (1918) (emphasis added)), are excludable. The report, like the statute itself, does not say only "compensatory damages received" are excludable. Instead, again like the statute itself, the report is most naturally read as distinguishing payments received under insurance policies or worker's compensation systems from payments received in an ordinary tort suit. The report, like the statute, treats these categories disjunctively. The Government repeatedly contends that the report and the statute's reference to "compensation" modifies both the categories of insurance or workers' compensation and personal injury lawsuits. Such a reading, however, is contrary to the plain language of the statute, as well

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extensively the text of the original and subsequent versions of the statute, the history and legislative history behind the statute, the tort and tax policies implicated by the statute, and the 1989 amendments. *See, e.g.*, Cohen-Whelan, *From Injury to Income: The Taxation of Punitive Damages "on Account of" United States v. Schleier*, 71 Notre Dame L. Rev. 913, 944-52 (1996); Comment, *I.R.C. Section 104(a)(2): IRS Above The Law?*, 25 Sw. U. L. Rev. 461 (1996); Serven, *The Taxation of Punitive Damages: Horton Lays an Egg?*, 72 Denv. U. L. Rev. 215 (1995); Morgan, *Old Torts, New Torts and Taxes: The Still Uncertain Scope of Section 104(a)(2)*, 48 La. L. Rev. 875 (1988).

as the legal background against which the statute was enacted.

The statute originally enacted in 1918 provided the following exclusion from taxable income:

> Amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness. Revenue Act of 1918, Pub. L. No. 65-254, 40 Stat. 1057, 1066 (1919).

The statute at issue in this case is unchanged with respect to the operative language "on account of," but it is now two subsections instead of one, with the result that the contrast between workers' compensation and insurance on the one hand, and a personal injury suit, on the other, has been somewhat obscured.

In tort law, there is a clear and obvious reason why Congress originally intended to distinguish between insurance or workers' compensation on the one hand and tort/personal injury lawsuits on the other. Workers' compensation generally did not exist until the early twentieth century.[9] Under traditional tort law, the liability of employers to employees was greatly limited by doctrines such as contributory negligence, assumption of the risk, and the fellow servant rule.[10] Employees under workers'

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9. *See, e.g., Prosser and Keeton on Torts, supra* at 573 (pointing out that the first state workers' compensation statute was enacted by New York in 1910 and "[b]y 1921 all but a few of the American states had enacted such legislation"); Rabin, *Some Reflections on the Process of Tort Reform*, 25 San Diego L. Rev. 13, 17 (1988) (the author "identifies workers' compensation as one strand in a broader pattern of legislative activity associated with the Progressive Era").

10. *See, e.g., Prosser and Keeton on Torts, supra* at 573 (describing the "three wicked sisters of the common law"); *Pomer v. Schoolman*, 875 F.2d 1262, 1265-67 (7th Cir. 1989) (Posner, J.) (discussing the history of the fellow-servant rule and its demise with the advent of workers' compensation).

compensation systems are entitled to compensation for injuries received on the job without having to establish any fault on the part of either employers or fellow employees (or the injured employee's own lack of fault).[11] Thus, workers' compensation often is referred to as a "no fault" or strict liability system of compensation.[12] In exchange for the preceding benefit, however, employees subject to workers' compensation generally receive predetermined or relatively fixed amounts for various types of injuries, and they cannot recover any punitive damages.[13] Generally, they also relinquish the right to sue their employer in tort for injuries suffered in the course of employment.[14] For these reasons, workers' compensation is administratively efficient but, for an employee who otherwise would have a meritorious tort claim, the compensation often may be insufficient to cover actual losses.[15]

This history has a bearing on the interpretation of § 104(a)(2) in that it explains the background against which Congress enacted the statute in 1918 and it provides a clear and logical reason why Congress chose to distinguish between insurance or workers' compensation on the one hand and traditional tort/personal injury suits on the other. The key is that under workers' compensation, as well as most individual insurance policies, the *only* recovery is for *compensatory*

11. *Prosser and Keeton on Torts*, *supra* at 573.

12. *Id.* ("Workers' compensation is thus a form of strict liability").

13. *Id.* ("in most cases the compensation is fixed by the statute itself") (footnote omitted).

14. *Id.* at 574 ("When an injury to a servant is found to be covered by a workers' compensation act, it is uniformly held that the statutory compensation is the sole remedy, and that any recovery against the employer at common law is barred") (footnote omitted).

15. *Id.* ("It is recognized that this remedy is in the nature of a compromise, by which the worker is to accept a limited compensation, usually less than the estimate which a jury might place upon his damages, in return for an extended liability of the employer, and an assurance that he will be paid").

damages. No punitive or other type of damages are recoverable under workers' compensation, nor under an individual's medical or disability insurance policies. The same obviously is not true of traditional tort/personal injury suits. Thus, in 1918, Congress logically intended to draw a distinction between the two categories and treat them differently for taxation purposes. A natural reading of the statute, one which takes into account both that the phrase "as compensation for personal injury or sickness" immediately follows and thus apparently modifies the references to insurance and workers' compensation and that the language "*plus* the amount of *any* damages" which corresponds to amounts received in a tort/personal injury suit,[16] is completely consistent with the status of workers' compensation and traditional tort law as both existed in 1918.[17]

The Government makes two other "legislative history" arguments which merit only brief attention. First, the Government contends that this Court already has reviewed "much of this same legislative and administrative history in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955)," U.S. Br. 20, and reached the conclusion the Government wants

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16. Petitioners' suggested reading of the statute thus does not, as the Government suggests, "tear asunder words that the statute has joined together." U.S. Br. 27. Only by ignoring the significance of the commas located within the 1918 statute, as well as principles of grammar, can the Government contend that the "as compensation" phrase was intended to modify the later reference to "any damages received" in a tort/personal injury suit.

17. Large punitive damages awards are a modern phenomenon, as members of this Court have remarked on recent occasions. *See, e.g., Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing"). Thus, it is unlikely that in 1918 Congress was at all concerned that § 104(a)(2) would exclude from taxation punitive damages awards received in tort/personal injury cases. The fact that punitive damages awards today are larger than in 1918, however, cannot change the language Congress enacted in 1918 or the intent behind the statute.

the Court to reach in this case. The Government's discussion of *Glenshaw Glass*, however, is misleading. As explained in petitioners' opening brief, in *Glenshaw Glass* the Court was asked to decide whether a treble damage award made under federal antitrust law constituted "gross income" within the meaning of § 61(a) of the Internal Revenue Code. This Court simply held that it did. *Glenshaw Glass* did *not* involve the interpretation of the predecessor to § 104(a)(2). From reading the Government's discussion of the case, however, one might be left with the impression that the § 104(a)(2) issue has been settled for over 40 years.

Second, the Government suggests that *subsequent* history, in particular the title of the statute ("Compensation for injuries or sickness") which did not accompany the statute enacted in 1918 and which was not added to the statute until the first codification of the revenue code *in 1939, twenty-one years later*, should be accorded controlling weight in ascertaining the meaning that Congress intended in 1918. *See* U.S. Br. 22 n.7. To state the argument is to refute its significance. The Government itself observes later in its brief that, "[a]s this Court frequently has emphasized, 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Id.* at 29 n.9 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).[18]

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18. The Government also contends that, under this Court's decision in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and subsequent cases, the IRS's current interpretation of § 104(a)(2) is entitled to deference. U.S. Br. 25-26. The Court expressly rejected this argument in *Schleier*, less than two years ago, in precisely the context of interpreting § 104(a)(2) and the IRS regulations implementing the statute. The Court held that "[i]n view of the Commissioner's differing interpretations of her own regulation, we do not accord her present litigating position any special deference." *Schleier*, 515 U.S. at __ n.7, 115 S. Ct. at 2166 n.7. That holding is just as appropriate, if not more so, in this case. Although the Government concedes that the IRS "has, over time, expressed differing views," U.S. Br. 25, regarding § 104(a)(2), the Government nonetheless contends that the IRS has (Cont'd)

II. THE GOVERNMENT'S SUIT TO RECOVER THE REFUNDS MADE TO THE O'GILVIE CHILDREN WAS UNTIMELY

A. The O'Gilvie Children Are Entitled To Raise The Statute Of Limitations

The Government commences its argument on the question whether its refund suit against the O'Gilvie Children was timely under 26 U.S.C. § 6532(b) by asserting, *for the first time in either this Court or the Tenth Circuit*, that the children are precluded from raising this issue and that the Court is precluded from deciding the issue. *See* U.S. Br. 35-37. The Government's position lacks merit for several reasons. First, the Tenth Circuit addressed the statute of limitations issue on the merits without any mention of or reference to potential preclusion questions. *See* Pet. App. 8a-10a. When a court of appeals reaches an issue on the merits, this Court has the power to do so as well.[19]

Second, the Government clearly has waived any right to object to this Court's consideration of the issue. In its brief in opposition to the O'Gilvie Children's petition for a writ of certiorari, the Government failed to raise any such objections.

(Cont'd)
endorsed a consistent interpretation since 1984. U.S. Br. 25. This statement, of course, ignores the fact that the IRS *approved and paid* the O'Gilvie Children's refund requests *in 1990*. Perhaps the IRS has had a consistent "official" interpretation of § 104(a)(2) since 1984, but this case is proof that there has been no such consistency in practice. For these reasons, the interpretation of § 104(a)(2) which the IRS now purports to endorse in this Court is not entitled to deference.

19. "Here we granted certiorari to review an issue squarely presented to and decided by the Court of Appeals, and we will proceed to decide it." *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981); *Stevens v. Department of* Treasury, 500 U.S. 1, 8 (1990); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Lebron v. National Railroad Passenger Corp.*, 513 U.S. __, __, 115 S. Ct. 961, 965 (1995).

This Court's rules clearly state that "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." Sup. Ct. R. 15.2. Indeed, this Court has made clear on more than one occasion that the:

> decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for a writ of certiorari . . . .

Oklahoma City v. Tuttle, 471 U.S. 808, 816 (emphasis in original); *Canton v. Harris*, 489 U.S. 378, 385 (1989) (same).

Lastly, the Government weakly argues that the O'Gilvie Children are trying to raise "new factual contentions on appeal," U.S. Br. 37 n.13, which the Government further contends are contrary to the stipulation the parties entered in the District Court. In addressing the statute of limitations issue, however, the O'Gilvie Children have not disputed any facts, nor attempted to inject any new facts into this Court's consideration of the question. Rather, they simply seek to have this Court interpret the meaning of the phrase "within 2 years of the making of such refund" as it is used in § 6532(b). That is obviously a legal question which is not subject to resolution by stipulation of the parties. The only relevant facts — none of which are in dispute — are that (1) the O'Gilvie Children received the refund checks on July 9, 1990, (2) the Government filed this suit for recovery of the refunds on July 9, 1992, and (3) the Government issued and mailed the refund checks prior to July 9, 1990. A stipulation that the amounts were "refunded" on July 9, 1990, is not inconsistent with the proposition that the refunds were "made" prior to that date.

B. The Two-Year Limitations Period Begins To Run On The Date The Government Either *Issues* Or *Mails* A Refund Check

The Government urges this Court to read the phrase "the making of such refund" in § 6532(b) to mean either (1) the date on which the taxpayer *receives* the refund or, implicitly, (2) the date the refund check is cashed and the taxpayer actually collects the funds. U.S. Br. 35-41. Petitioners question, however, whether the Government seriously desires a statute of limitations rule — applicable to suits brought *by the Government* — which is triggered by a date that is beyond the Government's control and often will not be readily ascertainable by the Government. Thus, other than its obvious and immediate interest in prevailing in this case, it is not apparent why the Government should desire the interpretation of § 6532 which it has proposed to this Court.

1. *The Plain Language of § 6532(b) Does Not Support the Government's Reading of the Statute*

Section 6532(b) requires the Government to file a suit for recovery of an erroneous refund "within 2 years after the making of such refund." The key word is "making," which, in this context could mean (1) the date on which the Government officially *approves* the refund, (2) the date the Government *issues* the check, (3) the date the Government *mails* the check, (4) the date the taxpayer *receives* the check, or (5) the date the check *clears* the Treasury. The Government urges the Court to adopt the fourth option, although the rationale of the Government's argument — that a refund is not "made" until the Government could sue to recover it — really leads to the conclusion that the fifth option is the rule the Government seeks.

The plain language of § 6532(b) certainly does not suggest the fourth or fifth options as the appropriate interpretations. Indeed, Congress could have written § 6532(b) to trigger the Government's two-year limitations period on the "receipt by the

taxpayer" or the "clearing of the refund check." It pointedly chose neither of those phrases.

Petitioners recognize that this Court, in *United States v. Wurts*, 303 U.S. 414 (1938) (the only case in which this Court has interpreted § 6532(b) or one of its predecessors), rejected the first option — that the statute is triggered on the date the Government officially *approves* (or "allows") the refund. In doing so, however, the Court equated the *mailing* of the refund with "actual payment." 303 U.S. at 415. Specifically, the Court described the facts as follows:

> March 15, 1932, the Commissioner erroneously approved a refund of taxes paid by respondent for the year 1929. April 30, 1932, a check *was mailed* to the taxpayer for this erroneous refund. April 26, 1934, more than two years after the allowance of the refund, *but less than two years after actual payment*, the Government brought this suit to recover the erroneous refund. 303 U.S. at 415 (emphasis added).

These facts make clear that, in *Wurts*, this Court equated the word "making" as used in the statute with the "mailing" of the refund check, precisely the interpretation petitioners suggest in this case. *See also id.* at 418 (repeatedly referring to the "making" of the refund as the date of "payment" without further elaboration). Thus, *Wurts* implicitly decided the issue presented in this case, and held that the date of mailing is the date of the "making" of the refund. The Government's suit against the O'Gilvie Children therefore is time-barred.[20]

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20. Even if this Court were to conclude, however, that *Wurts* did not decide that the date of mailing is the relevant date, there is no support for the assertion that *Wurts* decided which of the four remaining options triggers the running of the statute. In fact, the Court did not need to specify which of the remaining options triggers the statute because the Government's suit in *Wurts* was untimely only if the trigger date was the date on which the Government *approves* the refund, *i.e.*, the first option of the five listed above.

2. *Practical Considerations Support A Rule That a Refund is "Made" Either When the Government Issues or Mails a Refund Check*

Observing that petitioners argue "that treating a 'mailing' as if it were a 'refund' would be supported by common sense and by 'practical' considerations," U.S. Br. 41, the Government responds that "[i]n fact, however, common sense and practicality point the other way." *Id.* The Government then offers two hypotheticals which apparently are intended to illustrate the patent correctness of the Government's position:

> If, as petitioners assert, a "refund" is made simply by the act of placing a check in the mail, the Commissioner arguably could recover an erroneous "refund" even if the check were lost and never actually received by the taxpayer. The Commissioner could also refuse to issue a replacement refund check even if it were established that, after mailing, the original refund check was destroyed through no fault of the taxpayer. Neither of these results would comport with common sense. *Id.*

With all due respect to the Government, neither hypothetical makes *any* sense.

If a refund check has never been deposited or cashed by the taxpayer, or has never cleared the Treasury, there is simply *no* reason for the Government to file a suit to recover the refund. The Government's remedy in those circumstances is simple: *stop payment*.[21] If the taxpayer has never drawn on the funds behind

21. This is the same flaw present in the Tenth Circuit's resolution of this issue below. The Tenth Circuit, like the Government, opined that "the government could not have brought suit to recover the refund until the taxpayers had received the refund checks . . . ." Pet. App. 10a. Although that may be true, the argument ignores the fact that the Government's remedy prior to the time a refund check is cashed is the simple one of stopping payment on the check.

the refund check, as in the Government's first hypothetical above, why would the Government want to go to the trouble and expense of filing a refund recovery suit under § 7405? Likewise, petitioners fail to see how the Government legally could refuse to issue a replacement check in the circumstances of the second hypothetical. If the Government feared that the "lost" refund check might in fact eventually appear in the hands of someone who would attempt to cash it, the Government's protection is the relatively simple procedure of stopping payment on the first check.

By contrast, petitioners' proposed interpretation of the statute, that the trigger date is either the date on which the Government (1) *issues* the refund check (which should appear on the face of the check) or (2) *mails* the check to the taxpayer, has much to commend it in terms of common sense and simplicity. Because the claim at issue here belongs to the Government, it makes sense to interpret the statute as commencing to run on one of these dates, either of which should be easily ascertainable by the Government.[22] It seems odd to trigger the two-year period of

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22. Although the Government would have this Court believe that the O'Gilvie Children's proposed interpretation of § 6532(b) is novel and unprecedented, even a moment's reflection reveals other legal rules that operate along the lines petitioners suggest. For example, probably every lawyer can recall learning the "mailbox" rule in a first-year contracts class. Under this longstanding rule, an acceptance made in writing is deemed effective, *i.e.*, a legally binding contract is formed, when the acceptance is placed *in the mail*, not when the offeree or offeror actually *receives* it, or receives payment from the offeree, or takes some other action based on the acceptance. *See generally* E. Farnsworth, *Contracts* 180-81 (2d ed. 1990). This rule rests "on the simple assumption that there must be a single moment that is decisive in all cases." *Id.* In fact, the rule has been used to justify finding a legally binding contract even when, for some reason, the acceptance was lost and never reached the offeror. *Id.* at 184. The Restatement (Second) of Contracts § 63, Comment b. justifies this application on the grounds of "simplicity and clarity." The same grounds apply with considerable force to the statute of limitations issue now before the Court.

§ 6532(b) by reference to an event over which the Government does not have control, such as the taxpayer's *receipt* of the check, and which the Government may — as a practical matter — have a difficult time ascertaining. The uncertainties of the speed of mail delivery, the possibility of lost mail, the limitless possibilities of taxpayer conduct after mailing (*e.g.*, a taxpayer on an extended vacation or a taxpayer who has moved so that the Government does not have the taxpayer's current address), and the likelihood that most taxpayers do not even keep records of the date on which they receive pieces of mail, all counsel against an interpretation of § 6532(b) that depends upon a date not readily ascertainable by the Government or, in some cases, even by the taxpayers themselves.

Indeed, it would be foolhardy for the Government to file suit to recover an erroneous refund any later than two years after the date the refund was mailed and thus risk learning during discovery that the suit is untimely because the taxpayer received the check sooner than the Government expected. Rather, the prudent practice would be for the Governement to file suit within two years of the mailing of the check, as it did in *Wurts*. Petitioners' interpretation of the statute would greatly simplify its administration and minimize the likelihood of disputes arising as to its application in particular cases, thus avoiding unnecessary and costly litigation such as this case.

CONCLUSION

For the reasons stated above, as well as in the petitioners' opening brief, petitioners respectfully request that the Court reverse the Tenth Circuit, and hold that the Government's refund suit was untimely or, in the alternative, that the punitive damages award in this case was not taxable.

Respectfully submitted,

ROBERT M. HUGHES
Counsel of Record
GREGORY L. FRANKEN
DAVID B. SUTTON
BEVER, DYE, MUSTARD
& BELIN, L.C.
Attorneys for Petitioners Kevin M. O'Gilvie and Stephanie L. O'Gilvie, Minors
106 West Douglas, Suite 700
Wichita, Kansas 67202
(316) 263-8294

STEPHEN R. McALLISTER
Of Counsel
UNIVERSITY OF KANSAS
SCHOOL OF LAW
Green Hall
Lawrence, Kansas 66045
(913) 864-4550

(10) (9)

Nos. 95-966, 95-977

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE, minors,

Petitioners,

-and-

KELLY M. O'GILVIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE, MINORS

ROBERT M. HUGHES
Counsel of Record
GREGORY L. FRANKEN
DAVID B. SUTTON
BEVER, DYE, MUSTARD & BELIN, L.C.
Attorneys for Petitioners Kevin M. O'Gilvie and Stephanie L. O'Gilvie, minors
106 West Douglas
Suite 700
Wichita, Kansas 67202
(316) 263-8294

STEPHEN R. McALLISTER
Of Counsel
University of Kansas
School of Law
Green Hall
Lawrence, Kansas 66045
(913) 864-4550

8702-A
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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APPENDIX

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THE ISSUES PRESENTED IN *O'GILVIE V. UNITED STATES* CONTINUE TO MERIT THE PLENARY REVIEW OF THIS COURT

This supplemental brief is filed pursuant to Rule 25.5 of the Rules of this Court and in response to the supplemental brief filed by the United States in this case. The United States filed a supplemental brief to bring to this Court's attention the enactment of the Small Business Job Protection Act of 1996, which *prospectively* alters § 104(a)(2) of the Internal Revenue Code, the statutory provision at issue in this case. The United States correctly concludes that the 1996 statutory amendments "do not resolve" the taxation question in this case, Supplemental Brief for the United States at 3, and admits that Congress explicitly stated in its conference report on the amendments that "'[n]o inference is intended' as to the proper interpretation of the statute prior to its amendment." *Id.* at n.1 (quoting H.R. Conf. Rep. No. 737, 104th Cong., 2d Sess. 301 (1996)). The petitioners in No. 95-966 (hereinafter the "O'Gilvie children") agree completely. Thus, Congress, the United States and the O'Gilvie children are in unanimous agreement that the 1996 statutory amendments have no bearing on the resolution of the O'Gilvie children's case, and Case No. 95-977 consolidated with it (hereinafter collectively referred to as the "present cases"), now before the Court.

That consensus notwithstanding, the United States ventures that the mere enactment of these prospective amendments may cause this Court "to consider dismissing the writs of certiorari in the present cases as improvidently granted." *Id.* at n.2. The only improvidence to be found is the United States' suggestion of dismissal at this late date. The unspecified implication of the United States' suggestion in footnote 2 is that the 1996 amendments to § 104(a)(2) render the present cases moot. They do not. The United States has admitted the 1996 amendments

"do not resolve" the exclusion of punitive damages issue for the present cases. *Id.* at 3. Therefore, the suggestion of dismissal by the United States logically contradicts its own previous conclusion regarding the amendments' effect (or lack thereof). As quoted in the United States' supplemental brief, Congress expressly intended "no inference" regarding the exclusion of punitive damages prior to the effective date of the Small Business Job Protection Act of 1996 — its date of enactment, August 20, 1996. This lack of an inference applies specifically to the resolution of the O'Gilvie children's case now before the Court, of which Congress took explicit notice in its conference report.[1] The split in the circuits which existed on the exclusion of punitive damages under § 104(a)(2) when the Court granted certiorari in March of this year continues to exist following the August 1996 amendments to § 104(a)(2). The amendments do not purport to, and do not, resolve that split. Any implication by the United States to the contrary is erroneous.

The United States' suggestion of dismissal is ill-made for several other reasons. First, the petitions for a writ of certiorari in the present cases fully informed the Court of the amendments to § 104(a)(2) in 1989 which significantly changed its operative language, but which do not apply to the present cases because they arose prior to the effective date of the 1989 amendments. *See, e.g.*, No. 95-966, Pet. for a Writ of Cert. 13-14. Nonetheless, the Court granted certiorari, thereby rejecting any notion that the exclusion of punitive damages question under the pre-1989 version of § 104(a)(2) —the issue common to both of the present cases before the Court — no longer merited the Court's attention. The United States offers no reason or rationale why the 1996

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1. Joint Explanation of Conferees on HR 3448, Small Business Job Protection Act of 1996 at 141 n.54. *See* Appendix 1a-5a for complete text of Joint Explanation of Conferees on HR 3448, Small Business Job Protection Act of 1996, pertinent to amendments to Internal Revenue Code § 104(a)(2).

amendments now lead to a contrary conclusion or should suggest that the Court erred in its determination that these cases merit plenary review.

As noted in the petitioners' brief on the merits (Pet. Br. 31-32), Congress in 1989 amended § 104(a)(2) to provide that the exclusion thereunder "shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, Section 7641, 103 Stat. 2106, 2379. In explaining the rationale of the 1989 amendment the House Ways and Means Committee stated that damages for personal injuries should only be excluded when physical personal injuries were involved. *See* Revenue Reconciliation Bill of 1989, Explanation of Revenue Provisions as approved by the House Ways and Means Committee on September 14, 1989, at 238. The Conference Committee agreed that "the exclusion for damages received for personal injury does not apply to punitive damages in cases not involving physical injury or sickness." Revenue Provisions of Conference Agreement on H.R. 3299, Omnibus Budget Reconciliation Act of 1989, at 147. While acknowledging that the 1989 amendment does not directly control the present cases by reason of its effective date, the petitioners have asserted (Pet. Br. 31) a reasonable conclusion to be made from the 1989 amendment is that prior to the amendment all punitive damages received on account of personal injuries were excluded from taxation, while after the 1989 amendment only punitive damages received in cases involving physical personal injuries were excluded. This Court has previously reached just such a conclusion. "Congress amended § 104(a) to allow the exclusion of *punitive* damages only in cases involving 'physical injury or physical sickness.' " *United States v. Burke*, 504 U.S. 229, 235 n.6 (1992) (emphasis in original).

Interestingly, the United States' response to this analysis of

the 1989 amendment was to declare that the 1989 amendment is "not at issue in the present case, which involves events that preceded the effective date of that amendment." U.S. Br. 29.[2] It is ironic that the United States now seeks to have the present cases irrevocably dismissed from plenary review by this Court on the basis of an even later amendment to § 104(a)(2), an amendment which the United States admits does not resolve the present cases. Contrary to the suggestion of the United States, the 1996 amendment is "not at issue in the present case, which involves events that preceded the effective date of that amendment."

Second, Cases No. 95-966 and No. 95-977 present additional issues on which the Court granted certiorari but which the United States does not mention in its supplemental brief. These additional issues are legally distinct from the taxation issue on which the United States focuses. Moreover, these issues may be independently determinative of the outcome of the present cases.

The O'Gilvie children have raised, and this Court has granted certiorari on, the issue of whether the triggering event which commences the two year statute of limitations under 26 U.S.C. § 6532(b), for a suit by the United States to recover a refund erroneously made, is the issuance or mailing of the refund check by the United States or its receipt by the taxpayer. For the reasons set forth at pages 34-41 of their brief on the merits and at pages 15-19 of their reply brief, the O'Gilvie children's case

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2. The United States advanced the same argument in its brief in *Commissioner v. Schleier*, 515 U.S. __, 115 S. Ct. 2159 (1995), wherein the United States further noted its disagreement with this Court's analysis in *Burke* of the 1989 amendment. Brief for the United States, *Commissioner v. Schleier*, No. 94-500, at 33, n.22. The United States' unwillingness to accept this Court's interpretation of the 1989 amendment has perpetuated the uncertainty and confusion surrounding the scope of § 104(a)(2).

could be decided by the resolution of this issue without the Court ruling on the § 104(a)(2) exclusion issue. The United States' suggestion of dismissal at this late date would deprive the O'Gilvie children of the review, previously granted, on this possible basis for the Court's judgment. The same is equally true of the civil procedure question presented in No. 95-977 concerning whether the federal district court properly modified its judgment.

Third, the present cases remain worthy of the commitment of the judicial resources this Court allocated to them in originally granting certiorari. The petitioners are mindful that the "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition." *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). The 1996 amendments to § 104(a)(2), by the United States' own admission, do not decide the merits of the present cases. The O'Gilvie children have at issue a tax liability, plus accrued interest thereon, totaling more than $1.39 million. Their father, Kelly O'Gilvie, the petitioner in No. 95-977, has a similar amount at issue. Cases involving amounts of this magnitude pertaining to an issue on which a split in the circuits exists properly warrant a commitment of the Court's scarce judicial resources, as the Court determined last March.

More importantly, beyond the significance of the present cases to the petitioners, this Court through them can resolve years of uncertainty and confusion regarding the scope of the § 104(a)(2) exclusion as to punitive damages received on account of physical injuries or sickness—an issue which the Court has never directly addressed. The significance of cases involving punitive damages awards, both in terms of the prevalence of such cases and the magnitude of the awards, has not escaped the notice of this Court. *See, e.g., Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 8 n.4 (1990)

("[p]unitive damages are today awarded with a frequency and in amounts that are startling"); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("[a]wards of punitive damages are skyrocketing"). This prevalence and magnitude of punitive damages awards is further underscored by the projected federal budget impact of the 1996 amendments to § 104(a)(2). The Joint Committee on Taxation in its Estimated Budget Effects of the Conference Agreement Relating to the Revenue Provisions of H.R. 3448, The "Small Business Job Protection Act of 1996," projects the modification of § 104(a)(2) to result in $662 million of additional federal revenues from 1996 through 2006. *Id.* at 6. This projection, undoubtedly based on historical punitive damages awards, highlights the magnitude of existing punitive damages awards cases unresolved by the Small Business Job Protection Act of 1996. While the 1996 amendment may resolve the issue for physical injuries or sickness occurring on or after August 20, 1996,[3] by deciding the merits of the present cases this Court can finally resolve the issue for the untold hundreds, if not thousands, of prevailing plaintiffs, similarly situated to the O'Gilvie children, who received prior to August 20, 1996 punitive damages awards for physical injuries or sickness.

The uncertainty of the scope of § 104(a)(2) has arguably existed since the enactment of the Revenue Act of 1918. *See* Pet. Br. 15-19, Pet. Reply Br. 8-11. The vacillating rulings of the Internal Revenue Service through the years have not clarified the issue. *See* Pet. Br. 27-31. The 1989 amendment to § 104(a)(2) has been subject to varying interpretations (*see* Pet. Br. 31-34, U.S. Br. 28-32) which have confused, not resolved, the exclusion

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3. The 1996 amendment does not apply to punitive damages amounts received under a written binding agreement, court decree, or mediation award in effect on (or issued on or before) September 13, 1995. Joint Explanation of Conferees on HR 3448, Small Business Job Protection Act of 1996, at 143.

from taxation issue now before the Court.[4] Deciding the present cases on the merits is a worthy use of the Court's resources in order to finally resolve the taxation issue in all the pending punitive damages cases which arose before August 20, 1996 and which are therefore unaddressed by the 1996 amendments.

Finally, at this time, the present cases have been fully briefed by all of the parties, and the Court has scheduled oral argument for October 9, 1996. The United States made the argument in its brief in opposition to the petitions for a writ of certiorari that these cases do not warrant plenary review and the Court rejected it. The United States' recent suggestion that the Court essentially erred in granting certiorari also should be rejected.[5] Judgment in the present cases should be on the merits as determined by this Court. Under the circumstances, any other method of terminating these cases would be inequitable to the petitioners who have expended substantial resources since the grant of certiorari in briefing their case to this Court and preparing for oral argument before it.

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4. *See* note 2, *supra*.

5. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice 231-33, 258-62 (7th ed. 1993).

CONCLUSION

For all of the foregoing reasons, the Court should decline the United States' suggestion to revisit, at this late date, the Court's original decision to grant plenary review of the several issues presented in Nos. 95-966 and 95-977.

Respectfully submitted,

ROBERT M. HUGHES
Counsel of Record
GREGORY L. FRANKEN
DAVID B. SUTTON
BEVER, DYE, MUSTARD
& BELIN, L.C.
Attorneys for Petitioners
Kevin M. O'Gilvie and
Stephanie L. O'Gilvie, Minors
106 West Douglas, Suite 700
Wichita, Kansas 67202
(316) 263-8294

STEPHEN R. McALLISTER
Of Counsel
UNIVERSITY OF KANSAS
SCHOOL OF LAW
Green Hall
Lawrence, Kansas 66045
(913) 864-4550

APPENDIX

Joint Explanation of Conferees on HR 3448, Small Business Job Protection Act of 1996

Revenue Provisions (Title I)

* * *

VI. Revenue Offsets

* * *

5. Modify exclusion of damages received on account of personal injury or sickness (sec. 1605 of the House bill and sec. 1603 of the Senate amendment)

Present Law

Under present law, gross income does not include any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injury or sickness (sec. 104(a)(2)).

The exclusion from gross income of damages received on account of personal injury or sickness specifically does not apply to punitive damages received in connection with a case not involving physical injury or sickness. Courts presently differ as to whether the exclusion applies to punitive damages received in connection with a case involving a physical injury or physical sickness.[54] Certain States provide that, in the case of claims

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54. The Supreme Court recently agreed to decide whether punitive damages awarded in a physical injury lawsuit are excludable from gross income. *O'gilvie v. U.S.*, 66 F.3d 1550 (10th Cir. 1995), *cert. granted*, 64

(Cont'd)

under a wrongful death statute, only punitive damages may be awarded.

Courts have interpreted the exclusion from gross income of damages received on account of personal injury or sickness broadly in some cases to cover awards for personal injury that do not relate to a physical injury or sickness. For example, some courts have held that the exclusion applies to damages in cases involving certain forms of employment discrimination and injury to reputation where there is no physical injury or sickness. The damages received in these cases general consist of back pay and other awards intended to compensate the claimant for lost wages or lost profits. The Supreme Court recently held that damages received based on a claim under the Age Discrimination in Employment Act could not be excluded from income.[55] In light of the Supreme Court decision, the Internal Revenue Service has suspended existing guidance on the tax treatment of damages received on account of other forms of employment discrimination.

(Cont'd)

U.S.L.W. 3639 (U.S. March 25, 1996) (No. 95-966). Also, the Tax Court recently held that if punitive damages are not of a compensatory nature, they are not excludable from income, regardless of whether the underlying claim involved a physical injury or physical sickness. *Bagley v. Commissioner*, 105 T.C. No. 27 (1995).

55. *Schleier v. Commissioner*, 115 S. Ct. 2159 (1995).

Appendix

House Bill

Include in income all punitive damages

The House bill provides that the exclusion from gross income does not apply to any punitive damages received on account of personal injury or sickness whether or not related to a physical injury or physical sickness. Under the House bill, present law continues to apply to punitive damages received in a wrongful death action if the applicable State law (as in effect on September 13, 1995 without regard to subsequent modification) provides, or has been construed to provide by a court decision issued on or before such date, that only punitive damages may be awarded in a wrongful death action. No inference is intended as to the application of the exclusion to punitive damages prior to the effective date of the House bill in connection with a case involving a physical injury or physical sickness.

Include in income damage recoveries for nonphysical injuries

The House bill provides that the exclusion from gross income only applies to damages received on account of a personal physical injury or physical sickness. If an action has its origin in a physical injury or physical sickness, then all damages (other than punitive damages) that flow therefrom are treated as payments received on account of physical injury or physical sickness whether or not the recipient of the damages is the injured party. For example, damages (other than punitive damages) received by an individual on account of a claim for loss of consortium due to the physical injury or physical sickness of such individual's spouse are excludable from gross income. In addition, damages (other than punitive damages) received on account of a claim of wrongful death continue to be excludable from taxable income as under present law.

Appendix

The House bill also specifically provides that emotional distress is not considered a physical injury or physical sickness.[56] Thus, the exclusion from gross income does not apply to any damages received (other than for medical expenses as discussed below) based on a claim of employment discrimination or injury to reputation accompanied by a claim of emotional distress. Because all damages received on account of physical injury or physical sickness are excludable from gross income, the exclusion from gross income applies to any damages received based on a claim of emotional distress that is attributable to a physical injury or physical sickness. In addition, the exclusion from gross income specifically applies to the amount of damages received that is not in excess of the amount paid for medical care attributable to emotional distress.

No inference is intended as to the application of the exclusion to damages prior to the effective date of the House bill in connection with a case not involving a physical injury or physical sickness.

Effective date. — The provisions generally are effective with respect to amounts received after June 30, 1996. The provisions do not apply to amounts received under a written binding agreement, court decree, or mediation award on (or issued on or before) September 13, 1995.

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56. It is intended that the term emotional distress includes physical symptoms (e.g., insomnia, headaches, stomach disorders) which may result from such emotional distress.

Appendix

Senate Amendment

Include in income all punitive damages

The Senate amendment is the same as the House bill.

Include in income damage recoveries for nonphysical injuries

No provision.

Conference Agreement

Include in income all punitive damages

The conference agreement follows the House bill and the Senate amendment.

Include in income damage recoveries for nonphysical injuries

The conference agreement follows the House bill.

Effective date — The provisions generally are effective with respect to amounts received after date of enactment. The provisions do not apply to amounts received under a written binding agreement, court decree, or mediation award in effect on (or issued on or before) September 13, 1995.

(11) (10)

Nos. 95-966 and 95-977

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1995

KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE,
MINORS, PETITIONERS

v.

UNITED STATES OF AMERICA

KELLY M. O'GILVIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

6 pp

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

This supplemental brief is filed pursuant to Rule 25.5 of the Rules of this Court to bring to the attention of the Court legislation that was enacted after the date that the brief of the United States was filed in this case.

1. On August 2, 1996, Congress enacted the Small Business Job Protection Act of 1996. The President signed the Act into law on August 20, 1996. Section 1605(a) of the Act amends Section 104(a)(2) of the Internal Revenue Code to exclude from income (emphasis supplied):

> the amount of any damages (*other than punitive damages*) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal *physical* injuries or *physical* sickness.

Section 1605(b) of the Act further specifies that:

> For purposes of [Section 104(a)(2) of the Internal Revenue Code, as amended], emotional distress shall not be treated as a physical injury or physical sickness.

Section 1605(d) of the Act provides that these amendments apply "to amounts received after the date of the enactment of this Act" except for amounts received "under a written binding agreement, court decree, or mediation award in effect on (or issued on or before) September 13, 1995."[1]

---

[1] The entire text of Section 1605 of the Small Business Job Protection Act of 1996 is set forth in the Appendix, *infra*. The amending language that limits the statutory exclusion to damages resulting from "personal physical injuries or physical sickness" significantly narrows the general scope of that provision. See *United States* v. *Burke*, 504 U.S. 229, 242 (1992) (Scalia, J., concurring in the judgment).

In adopting these amendments to Section 104(a)(2) of the Internal Revenue Code, Congress noted that courts have been in disagreement as to whether punitive damage awards are excluded from income under the prior text of that Section. The Conference Report states that, in resolving that issue

2. The principal question presented in these cases, which are scheduled for argument on October 9, 1996, is whether punitive damages awarded in a suit involving personal injuries are excludable from income under Section 104(a)(2). The amendments to Section 104(a)(2) contained in the Small Business Job Protection Act of 1996 do not resolve that question with respect to payments of punitive damages made prior to the date that the amendments were enacted—and therefore do not resolve that question in the present cases. See note 1, *supra*.[2]

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

AUGUST 1996

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prospectively, "[n]o inference is intended" as to the proper interpretation of the statute prior to its amendment. H.R. Conf. Rep. No. 737, 104th Cong., 2d Sess. 301 (1996).

[2] Because Congress has prospectively determined for all tax years after 1996 that punitive damages awards are *not* to be excluded from income under this statute, however, the Court may wish to consider dismissing the writs of certiorari in the present cases as improvidently granted. See also 95-966 U.S. Br. in Opp. 5-8.

APPENDIX

Section 1605 of the Small Business Job Protection Act of 1996 provides:

> **(a) IN GENERAL.**—Paragraph (2) of section 104(a) (relating to compensation for injuries or sickness) is amended to read as follows:
>
> "(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;".
>
> **(b) EMOTIONAL DISTRESS AS SUCH TREATED AS NOT PHYSICAL INJURY OR PHYSICAL SICKNESS.**—Section 104(a) is amended by striking the last sentence and inserting the following new sentence: "For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care (described in subparagraph (A) or (B) of section 213(d)(1)) attributable to emotional distress.".
>
> **(c) APPLICATION OF PRIOR LAW FOR STATES IN WHICH ONLY PUNITIVE DAMAGES MAY BE AWARDED IN WRONGFUL DEATH ACTIONS.**—Section 104 is amended by redesignating subsection (c) as subsection (d) and by inserting after subsection (b) the following new subsection:

"(c) **APPLICATION OF PRIOR LAW IN CERTAIN CASES.**—The phrase '(other than punitive damages)' shall not apply to punitive damages awarded in a civil action—

"(1) which is a wrongful death action, and

"(2) with respect to which applicable State law (as in effect on September 13, 1995 and without regard to any modification after such date) provides, or has been construed to provide by a court of competent jurisdiction pursuant to a decision issued on or before September 13, 1995, that only punitive damages may be awarded in such action.

This subsection shall cease to apply to any civil action filed on or after the first date on which the applicable State law ceases to provide (or is no longer construed to provide) the treatment described in paragraph (2).".

(d) **EFFECTIVE DATE.**—

(1) **IN GENERAL.**—Except as provided in paragraph (2), the amendments made by this section shall apply to amounts received after the date of the enactment of this Act, in taxable years ending after such date.

(2) **EXCEPTION.**—The amendments made by this section shall not apply to any amount received under a written binding agreement, court decree, or mediation award in effect on (or issued on or before) September 13, 1995.

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No. 95-977

In The

Supreme Court of the United States

October Term, 1995

KELLY M. O'GILVIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR THE PETITIONER IN OPPOSITION TO DISMISSAL OF WRIT

LINDA D. KING
6135 E. Central
Wichita, Kansas 67208
(316) 686-2000
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. Introduction.

The statute, § 104(a)(2), as amended, remains ambiguous. In their decisions regarding this statute, the courts have embedded in our law an impermissible "default rule" to override the intent of Congress found in extrinsic evidence. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 5-10; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 8-19; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 7-8.) The illogical interpretation that finds two tests from that ambiguous language is the current and controlling interpretation for this statute, as amended. This illogical interpretation remains uncorrected for future application to the statute. The grievous harm done to our system of statutory interpretation to arrive at these impermissible and illogical rules remains unrepaired.

The 1996 Amendment of § 104(a)(2) has resolved none of the fundamental questions and cleansed none of the errors. Each of the fundamental questions posed in this case (What is the nature of ambiguity? How must and how may that ambiguity be resolved? What is the proper hierarchy and application of the methods of statutory interpretation with regard to this federal statute? What is the test posed by the language of this statute?) remain as fresh and pertinent after the 1996 Amendment as when *certiorari* was granted on March 25, 1996.

II. Court Did Not Lack Foresight in Granting Certiorari on March 25, 1996.

The Solicitor General seems to suggest that because there has been a change in the law since *certiorari* was

granted that the decision to grant *certiorari* was improvident, that is, lacking foresight. The Solicitor General acknowledges that there has been no change in the law that relates to the facts of this case. The only new development is a new amendment to § 104(a)(2). The statute, as amended, remains ambiguous.[1] It would have been improper for the Court to refuse to hear an otherwise appropriate case based solely on the speculation that Congress might enact a future law that would change prospectively the outcome on these facts. There was no lack of foresight in granting *certiorari* on March 25, 1996.

III. Interpretation of § 104(a)(2) Remains Justiciable and Highly Relevant

A. Fairness and Justice

The question the Solicitor General should pose and the question which must be answered is whether once *certiorari* has been granted, withdrawal of the grant of the *writ* is an appropriate consequence of a change in the law that operates prospectively only. As the Solicitor General has stated, the question of exclusion of these punitive damages is not resolved by the 1996 Amendment and so the outcome of the case remains highly significant to many taxpayers whose cases are currently awaiting the outcome of this review. (E.g., *Bagley v. Commissioner*, 105 T.C. 396 (1995), appeal pending, No. 96-1768 (8th Cir.) (stayed pending outcome of Cert. Nos. 95-966 and

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[1] The new amendment is competent evidence of Congress' conviction that the prior statute (§ 104(a)(2)) excluded punitive damages, for there is no need to change a statute that already prohibits the exclusion to punitive damages.

95-977); *Birchenough v. United States*, No. 96-1323-JTM (D. Kan.); *Brothers v. United States*, No. 95-1240-MLB (D. Kan.); *Dallas Autery v. Commissioner*, No. 10903-96 (TC) (stayed pending outcome of Cert. Nos. 95-966 and 95-977); *Kari Lane v. United States*, No. 95-6320 (10th Cir.) (stayed by agreement pending outcome of Cert. Nos. 95-966 and 95-977); *Miller v. United States*, No. 96-1324-WEB (D. Kan.) and *Terrance A. and Virginia K. Johnson v. Commissioner*, No. 1786-96 (TC) (stayed pending outcome of Cert. Nos. 95-966 and 95-977.) To deny those taxpayers application of the proper law after *certiorari* has been granted, only because Congress later changed the law for others is unjust and incomprehensible to all but the most sophisticated minds. This Court should retain this case for justice and fairness and the perception of justice and fairness, if for no other reason.

B. Rationale for Granting Certiorari Unchanged

While Congress has added a limit to the exclusion, the original reasons for granting *certiorari* still exist in the amended statute.

i. Default Rule.

Courts have applied a "default rule" upon the finding of an ambiguity in the words of the statute. *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990), 90-2 USTC ¶ 85,713 (1990); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994), 94-1 USTC ¶ 50,232 (Fed. Claims 1994); *Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995), 94-1 USTC ¶ 50,130, *reh'g denied*,

1995 U.S. App. Lexis 12,574; and *O'Gilvie v. United States*, 66 F.3d 1550 (10th Cir. 1995), 95-2 USTC ¶ 50,508. This "default rule" requires that the "intent of Congress" found in extrinsic evidence be disregarded to find in favor of the government. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 5-10; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 3, 8-19; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 7-8.) The flaw in these decisions is precisely this: The "principle of narrow construction" is not a "default rule" that relieves the court from comprehensive review of extrinsic evidence. The "principle of narrow construction" requires that the intent be discerned from the careful analysis of all extrinsic evidence and that clear intent to exclude is evidenced. This "default rule" remains the controlling law for § 104(a)(2), as amended and by implication, for all federal statutes that carve out a benefit for citizens and taxpayers. See *C.I.R. v. Schleier*, 515 U.S. ___, 115 S.Ct. 2159, 95-1 USTC ¶ 50,309 (1995). Nothing in the 1996 Amendment changes this improper rule and this rule continues to be applicable far beyond § 104(a)(2).

ii. Ambiguity.

The Courts have applied conflicting standards for determination of whether this section is ambiguous and arrived at different results. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 4, 10-16; *Petitioner's Brief* – Keliy M. O'Gilvie, pages 20-24; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 13-15.) The ambiguous language remains: "any damages . . . received on account of personal injuries." The 1996 Amendment does

not resolve the question of whether the statute is plain, as the courts found in *Schleier, supra;* and *Horton v. Commissioner,* 33 F.3d 625 (6th Cir. 1994); or ambiguous as the appellate courts found in *Miller, supra; Wesson, supra; Hawkins, supra;* and *O'Gilvie, supra.*

iii. Two Tests from the Same Language.

The two individual tests illogically derived by the various courts from that ambiguous language are unaltered: 1) Treasury Regulation § 1.104-1(c) test; the "nature of the underlying claim," and 2) the "nature of the damage award." One of these tests is applicable to all damages received not only upon the Petitioner's claim for the death of his Wife here, but also to damages awarded in all future claims for tort or tort-like injury. Which test is proper is the issue. If the taxpayer must meet both tests, then the second test, the "nature of the damage award," which had been repeatedly rejected by the *Threlkeld v. C.I.R.,* 848 F.2d 81 (6th Cir.); line of cases has been approved, and the *Threlkeld* line of cases is logically, if not judicially, overruled. (See discussion *Petition for Certiorari* – Kelly M. O'Gilvie, pages 18-20; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 17, 19, 30-31; and *Petitioner's Reply Brief,* page 16.) This very timely issue derives from the question of the proper test to apply and has been reopened by these recent cases, notably *Schleier, supra.* The adoption of the "nature of the damage award" test is not addressed by the 1996 Amendment and would remain an unresolved issue for future taxpayers. The question of two separate tests from the same language is an issue that is as relevant to interpretation of this

amended statute as it is to the interpretation of this statute under the facts of this case.

iv. Recent Decisions Wreak Havoc With Time Honored Methods of Statutory Construction.

The 1996 Congressional Amendment of § 104(a)(2) does not cleanse the law of improper and illogical rules of interpretation and construction articulated and applied in these cases. (*Miller, supra; Schleier, supra; Wesson, supra; Reese, supra; Hawkins, supra;* and *O'Gilvie, supra.*) These improper rules remain intact to further accumulate and obstruct our method of interpreting federal statutes. These cases uniformly fail to articulate any hierarchy or weighing of extrinsic evidence with regard to the intent of Congress. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 16-22; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 25-36; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 4-5, 11-12.)

a. Plain Language of Original Statute Ignored.

The rule of interpretation "that prior acts may be resorted to, to solve, but not to create, an ambiguity," *Hamilton v. Rathbone,* 175 U.S. 414 (1899), is entirely absent from the decisions. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 22-24; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 36-39; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, page 17.) What clearer evidence of the intent of the original Enactors than the words they wrote. All parties agree that the original statute had been reenacted without material change since

1918; yet no court which found ambiguity addressed the plain words of the original statute. This is true even though the question of the intent of the enacting Congress is offered as the fundamental question where the courts find ambiguity. (*Miller, supra; Schleier, supra; Wesson, supra; Reese, supra; Hawkins, supra;* and *O'Gilvie, supra.*) The 1996 Amendment has not altered the fundamental question of the intent of the Enactors and the answer to the question remains essential to the proper interpretation of the old and the amended statute.

The two independent clauses of the original statute have two distinct subject clauses: the first, "amounts received as compensation," and the second, "the amount of any damages." These two independent clauses have only the *object of a prepositional phrase* in common; "for **personal injuries or sickness**" in the first clause and "on account of **such injuries**" in the second. There is no conceivable reading of the statute that would permit the word "compensation" to modify any part of the second clause. The word compensation is inextricably bound to the words which precede it and is unavailable to modify the words which follow. And yet these very words of the original statute are given scant attention in the case law. Instead the decisions are dominated by speculations about "rationale" and the "underlying compensatory purpose." This issue of the intent of the original words remains in the amended statute as the basis for decision of which of the two competing meanings was intended by Congress.

b. Disregard of Extant Treasury Regulation.

The courts which have chosen to apply a "default rule" have either blatantly ignored Treasury Regulation 1.104-1(c) (e.g. *Miller, supra*) or dismissed that Treasury Regulation as merely an additional administrative requirement, (e.g. *Schleier, supra*). This Treasury Regulation is the articulation of one of the competing tests for exclusion in the amended statute. Because the IRS had no authority to issue a quasi-legislative regulation for this section, the IRS had no authority to impose an "additional administrative requirement." The finding of this Court in *Schleier* that the IRS made additional law is not consistent with statutory limit of authority of the IRS to make laws. The Treasury Regulation is an interpretive regulation only and is not permitted to be an "additional administrative requirement."

The improper characterization of this Treasury Regulation here is crucial to the interpretation of this statute as having only one or two tests, an issue of pressing relevance for interpretation of the old and amended statute.

c. Prohibited Interpretation by Title Predominates.

A primary rationale for the finding of an underlying compensatory purpose in *Miller, supra,* and progeny is the title and arrangement of § 104(a). This use of title for interpretation is prohibited by statute. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 25-27; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 39-43; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 10-12, 16-18.) The finding of an underlying compensatory purpose dominates the discussion in *Miller* and is controlling

the choice of the second test. The amended statute is still burdened with this misuse of title and arrangment to interpret and that misuse is determinative of the test.

d. Congressional Reenactments and Amendments of Statute Ignored.

The use of later enactments to clarify previous law is not prohibited as the IRS asserts. This use of later enactments has been approved and demonstrated in the case of *Hamilton, supra; United States v. Community TV, Inc.*, 327 F.2d 797 (10th Cir. 1964); and *Burke v. United States*, 504 U.S. 229 (1992); to clarify an ambiguous statute. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 16-21; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 25-36; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 4-5, 11-12.) While the admonition that "the view of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" is apt, that admonition goes only to the use of a later view for inference of intent of the enacting Congress and does not prohibit review of the statute for other purposes in appropriate circumstances.

The court is vested with the discretion to determine what extrinsic evidence might be brought to bear on the question of an ambiguous statute and what weight to give that evidence. There are other factors here that indicate that careful consideration should be given to the 1989 Amendment, and now 1996 Amendment, of this statute by Congress. The reenactments and amendments of later Congresses with the interpretation of the statute as limiting only the *type of claim* is not an attempt to infer

the intent of the Enactors, but are surely relevant to the question of Congressional approval of long standing administrative practice and approval of relevant case law. The interest of the public in a consistent and cohesive body of law is great and the power of the Congress to make law is predominant.

e. Interpretation of Intent by Resort to Speculation about Rationale.

In determining which of the two tests is correct, the courts have confused the rationale behind the writing of the words with the intent of the Enactors in the meaning of the words. (See discussion in *Petition for Certiorari* – Kelly M. O'Gilvie, pages 22-24; *Petitioner's Brief* – Kelly M. O'Gilvie, pages 36-39; and *Petitioner's Reply Brief* – Kelly M. O'Gilvie, pages 10-11, 16-18.) The improper finding of a single rationale, i.e., return of capital strongly influenced the decisions of the courts with regard to the question of which of the two tests to apply. This question also remains an issue in the statute after the 1996 Amendment.

f. Summary.

The cases have been dominated by a method of interpretation of a federal statute that requires application of a "default rule" when the statute is on its face ambiguous. This improper application of a "default rule" is potentially relevant to interpretation of each and every federal statute and cannot stand. The methodology that favors the government so strongly with a "default" rule will have the power of river to erode citizens rights granted

by Congress and believed to be etched in stone. The methodology exhibited in the cases leading to this *writ* is so piece-meal and helter-skelter that lower courts have no guide for decision-making.

A review of these cases reveals that there is no discernible or predicable system for interpretation. The principles of statutory construction are in dynamic flux. Like a glacier that has begun to move after a millennium, what was believed to be frozen solid for all time has come loose. An inviolate principle has collided with modern necessity. The principle requiring interpretation of statutory law as the enacting Congress intended is conflicting with the necessary modern policies to make statutory law easy to administer by agencies and to reduce the burden on the court system of the time consuming, maze-like analysis of "intent" that has clogged the courts.

The opportunity for a broad review of the method of statutory interpretation is rare. For as critical and determinative as the underlying method is, the method is not the usual topic of review. Instead the result or outcome is the focus of the inquiry and the details of statutory construction are mere addendums. This case with all its errors offers the unparalleled opportunity to re-examine and properly order the principles and the hierarchy of statutory interpretation at a time of exceptional relevance. A more appropriate case for focusing upon the fundamentals is unlikely.

The same underlying method of construction and interpretation of this statute will yield the correct answer for the issues raised by Petitioner's case and for future taxpayers seeking the protection of this statute.

IV. Impermissible Expansion of Judicial Authority to Modify Judgments – F.R.C.P. 60(a).

With regard to the F.R.C.P. 60(a) issue of the Petitioner, the 1996 Amendment has no relevance. The Petitioner has already throughly argued the application of the Federal Rules of Civil Procedure law to show that the IRS did not file its notice of appeal timely. If the Judgment of November 30, 1993 was amended under Rule 60(a), then there was no tolling of the time in which to file the notice of appeal. No motion was made that the Judgment be amended. This is certain. The Judgment was *amended* by the district court. That is certain. There is no Federal Rule except Rule 60(a) under which the district court had authority to amend a Judgment on its own motion. The district court must have amended its Judgment under some authority outside the Federal Rules of Civil Procedure, or the IRS did not timely file their appeal.

Respectfully submitted,

LINDA D. KING, Counsel
6135 E. Central
Wichita, Kansas 67208
(316) 686-2000